CUMULATIVE SUPPLEMENT

TO

THE CRIMINAL LAW DIGEST

March 2001-October 2004

APPEALS (*See also* **COURTS, DOUBLE JEOPARDY**)

I. INTRODUCTION

B. Procedural Aspects

An appeal from municipal court directly to the Appellate Division violates *R.* 2:2-3. *State v. Nikola,* 359 *N.J.Super.* 573 (App. Div.), *certif. denied,* 178 *N.J.* 30 (2003); *State v. Fulford*, 349 *N.J.Super.* 183 (App. Div. 2002).

D. Briefs on Appeal

The State may not refuse to take a position on an issue defendant raises, and must provide a factual and legal reply unless it concedes the issue. *State v. Roper,* 362 *N.J.Super.* 248 (App. Div. 2003).

Appellate counsel must cite and discuss cases directly on point, especially when lower courts relied on them. *State v. Jorn*, 340 *N.J.Super.* 192 (App. Div. 2001).

IV. INTERLOCUTORY APPEALS

B. To the Supreme Court

See State v. Harvey, 176 *N.J.* 522 (2003).

VI. APPEALS BY DEFENDANTS

See State v. Hogue, 175 *N.J.* 578 (2003) (on direct appeal, defendant may move for a remand to the trial court for DNA testing).

VII. APPEALS BY THE STATE

A. Dismissal of Indictment, Accusation or Complaint

State, a party in interest, can appeal domestic violence restraining order violation dismissals based on the victims' failure to appear for status conferences. *State v. Brito*, 345 *N.J.Super.* 228 (App. Div. 2001).

The State was not procedurally barred from raising, for the first time on appeal, additional distinctions between New Jersey and New York statutes regarding child endangerment because the "general tenor" of its argument remained unchanged. *State v. Gruber*, 362 *N.J.Super.* 519 (App. Div.), *certif. denied*, 178 *N.J.* 251 (2003).

D. Appeal from Sentence

State timely appealed defendant's sentence pursuant to *N.J.S.A.* 2C:44-1f(2). *State v. Evers*, 368 *N.J.Super.* 159 (App. Div. 2004).

State untimely attempted to appeal from the imposition of probationary terms on resentencing for defendant's second degree convictions. *State v. Gould*, 352 *N.J.Super.* 313 (App. Div. 2002).

State's appeal of failure to impose "Three Strikes" sentence (*State v. Galiano*, 349 *N.J.Super.* 157 (App. Div. 2002), and *State v. Livingston*, 340 *N.J.Super.* 133 (App. Div.), *aff'd*, 172 *N.J.* 209 (2002)) and NERA term (*State v. Parolin*, 339 *N.J.Super.* 10 (App. Div. 2001), *rev'd o.g.* 171 *N.J.* 223 (2002)).

IX. STANDARDS OF REVIEW ON APPEAL

A. Reasons for Decision

Appellate courts affirm or reverse judgments and orders, not the reasons for them. *State v. Maples*, 346 *N.J.Super.* 408 (App. Div. 2002).

D. Fact Finding by the Trial Court

Appellate courts are required to give deference to the trial court's findings based upon witnesses' testimony. *State v. Dangerfield*, 171 *N.J.* 446 (2002).

ARREST (*See also* **ESCAPE, OBSTRUCTION OF JUSTICE, RESISTING ARREST, SEARCH AND SEIZURE, SELF-DEFENSE**)

II. PROBABLE CAUSE FOR ARREST

See State v. Dangerfield, 171 *N.J.* 446 (2002).

See State v. Nikola, 359 *N.J.Super.* 573 (App. Div.) (officers had probable cause that defendant was driving drunk, and could thereafter walk down her driveway and follow her into her open garage to arrest her without a warrant), *certif. denied*, 178 *N.J.* 30 (2003).

III. WARRANTLESS ARRESTS BY POLICE OFFICERS

A. Adults

Valid warrantless arrest for misdemeanor seat belt violation. *Atwater v. City of Logo Vista*, 532 *U.S.* 318 (2001).

Police can arrest for disorderly or petty disorderly persons offenses committed in their presence. *State v. Dangerfield*, 171 *N.J.* 446 (2002).

V. PROCEDURE AFTER A WARRANTLESS ARREST

While police can arrest for disorderly or petty disorderly persons offenses committed in their presence, the Supreme Court chose not to resolve whether any search limitations were appropriate in connection with a defendant validly arrested for defiant trespass. *State v. Dangerfield*, 171 *N.J.* 446 (2002). However, consistent with *State v. Pierce*, 136 *N.J.* 184 (1994), officers have the right, following a valid custodial arrest for a motor vehicle violation or criminal offense, to search defendant's person based solely on the arrest. *Id.*

VI. ARRESTS WITH WARRANTS

C. Execution

See State v. Cleveland, 371 *N.J.Super.* 286 (App. Div. 2004); *State v. Rose*, 357 *N.J.Super.* 100 (App. Div.), *certif. denied*, 176 *N.J.* 429 (2003).

IX. DETENTION ON LESS THAN PROBABLE CAUSE

C. Investigatory Detention

2. On-The-Street

A stop based only on a "hunch," not on objectively reasonable and articulable suspicion, is improper. *State v. Love*, 338 *N.J.Super.* 504 (App. Div. 2001).

ARSON, CAUSING OR RISKING WIDESPREAD INJURY OR DAMAGE, CRIMINAL MISCHIEF

I. ARSON: SCOPE OF THE OFFENSE

Most forms of arson no longer include an intent to burn a dwelling house or other structure as an element, and thus defendant could be convicted of felony murder for setting fire to the victim and not to a structure itself. *State v. Arenas,* 363 *N.J.Super.* 1 (App. Div. 2003), *certif. denied*, 178 *N.J.* 452 (2004). The sole *mens rea* element is to purposely or knowingly place another person in danger of death or bodily injury by starting a fire. *Id.*

ATTEMPT

IV. SUBSTANTIAL STEP

See State v. Perez, 177 *N.J.* 540 (2003).

ATTORNEYS (*See R.P.C.* 1.1 *et seq.*, *R.* 1:14)

II. DEFENSE COUNSEL - CONFLICT OF INTEREST

No conflict of interest existed where defense counsel, a former public defender retained by the Public Defender's Office, had civilly sued that Office. *State v. Davis*, 366 *N.J.Super.* 30 (App. Div. 2004). Counsel's clients were the individual defendants, not the Public Defender. *Id.*

No conflict of interest existed where defense attorney in a capital case also represented for a day a client who was questioned during the police investigation of the case. *State v. Jimenez*, 175 *N.J.* 475 (2003).

A law firm may not represent a defendant accused of killing another of the firm's clients. *State in re S.G.*, 175 *N.J.* 132 (2003). Here the firm represented both clients during the same 2 week time period, and defendant could not waive the conflict. *Id.*

In *State v. Pierrevil*, 341 *N.J.Super.* 266 (App. Div. 2001), the Appellate Division reversed the trial court's grant of the State's motion to recuse defense counsel. Counsel had represented another man charged with the same murder for which defendant was

standing trial, but that representation would not materially limit representation of defendant. The matter was remanded to resolve whether a potential or actual conflict existed, and if a potential conflict did exist the court had to determine whether or not there was a likelihood of prejudice.

VI. CONTEMPT/DISCIPLINARY ACTION

See In re Seelig, 180 *N.J.* 234 (2004).

BAIL

I. BEFORE CONVICTION

G. Forfeiture of Bail

See State v. Simpson, 365 *N.J.Super.* 444 (App. Div. 2003); *State v. Clayton*, 361 *N.J.Super.* 388 (App. Div. 2003); *State v. Dillard*, 361 *N.J.Super.* 184 (App. Div. 2003); *State v. Harmon*, 361 *N.J.Super*. 250 (App. Div. 2003); *State v. DeLaHoya*, 359 *N.J.Super.* 194 (App. Div. 2003).

3. Standard of Review

Defendant's post-verdict release substantially increased his flight risk, and pre-conviction surety could not be compelled to accept that increased risk. *State v. Ceylan*, 352 *N.J.Super.* 139 (App. Div.), *certif.denied*, 174 *N.J.* 545 (2002).

Trial court can, in its discretion, order forfeiture of a portion of the bail posted when defendant violates a condition of bail by contacting and threatening codefendants. A violation of such a "non-appearance" condition can, under the totality of the circumstances, justify the court's exercise of discretion in forfeiting bail. *State v. Korecky*, 169 *N.J.* 364 (2001).

CAPITAL PUNISHMENT

I. CONSTITUTIONALITY

A. Federal Standards

Under *Apprendi v. New Jersey*, 530 *U.S.* 466 (2000), the jury and not a judge must find the aggravating factors leading to a death sentence. *Ring v. Arizona*, 536 *U.S.* 584 (2002) (overruling *Walton v. Arizona*, 497 *U.S.* 639 (1990)). *Ring*, however, does not apply retroactively on collateral review. *Schriro v. Summerlin*, 124 *S.Ct.* 2519 (2004).

II. GUILT PHASE

Trial court should have *voir dired* jurors on the effect of hearing other-crimes evidence, used to prove identity, of defendant's sexual assault on a Maine State Trooper. *State v. Fortin*, 178 *N.J.* 540 (2004).

D. Jury Voir Dire

See Martini v. Hendricks, 348 *F.*3d 360 (3d Cir. 2003) (as to trial court's excusal of potential juror).

F. Jury Charges at Guilt Phase

Sequential instructions on own-conduct murder and accomplice liability coerced jury into returning a death-eligible guilt-phase verdict. *State v. Josephs*, 174 *N.J.* 44 (2002). The State need not meet a "no doubt" standard for conviction in circumstantial evidence cases. *Id.*

III. PENALTY PHASE

A. General Principles

Defendant should have been allowed to waive *ex post facto* claim so the jury could be told that he would be sentenced to life without parole. *State v. Fortin*, 178 *N.J.* 540 (2004). *See State v. Chew*, 179 *N.J.* 186 (2004) (as to defendant's claims of ineffective assistance at the penalty phase).

Ambiguous verdict sheet meant that some jurors may have considered an aggravating factor that was not unanimously found. *State v. Nelson*, 173 *N.J.* 417 (2002).

B. Aggravating Factors

Now aggravating factors must be submitted to the grand jury pursuant to the state constitution. *State v. Fortin*, 178 *N.J.* 540 (2004). Grand jurors, however, need not be "death qualified," and could not be *voir dired* regarding their views on capital punishment. *State v. Toliver*, 180 *N.J.* 164 (2004). Mitigating evidence need not be presented to the grand jury. *Id.*

6. Murder in Course of Felony

State must reprove "murder in the course of another murder" aggravating factor beyond a reasonable doubt where the guilt-phase factfinder is different from the penalty-phase factfinder. *State v. Josephs*, 174 *N.J.* 44 (2002). This does not permit the penalty-phase factfinder to overturn defendant's murder conviction, though. *Id.*

C. Mitigating Factors

Trial counsel was ineffective for failing to investigate and present a mitigation defense during the penalty phase. *Marshall v. Hendricks*, 313 *F.Supp.*2d 423 (D.N.J. 2004).

1. Extreme Mental or Emotional Disturbance (*N.J.S.A.* 2C:11-3c(5)(a))

See State v. Chew, 179 *N.J.* 186 (2004).

5. Any Other Factor Relevant to Defendant's Character, Record or Circumstances of the Offense - *N.J.S.A.* 2C:11-3c(5)(h) (catch-all)

Trial court erroneously instructed the jury on the use of victim-impact evidence, on the alternative sentences the jury could impose in lieu of a death sentence, and for the jurors not to consider any rejected aggravating factor. *State v. Koskovich*, 168 *N.J.* 448 (2001).

IV. JURY DELIBERATION ISSUES

Neither double jeopardy nor fundamental fairness barred a capital retrial where the jury could not reach a unanimous verdict as to murder. *State v. Cruz*, 171 *N.J.* 419 (2002).

V. MISCELLANEOUS

Trial counsel was ineffective during sentencing phase, according to professional norms at the time, for failing to adequately investigate defendant's background when considering trial strategy of whether or not to present mitigating evidence. *Wiggins v. Smith*, 539 *U.S.* 510 (2003); *see Marshall v. Hendricks*, 313 *F.Supp.*2d 423 (D.N.J. 2004).

Strickland standards were met even though trial counsel failed to adduce mitigating evidence and present a closing argument during a capital sentencing hearing. *Bell v. Cone*, 535 *U.S.* 685 (2002).

Issue raised in defendant's second post-conviction relief petition was identical to one raised in his first petition, and thus *R.* 3:22-5 procedurally barred it. *State v. Marshall*, 173 *N.J.* 343 (2002). Also, the second petition was untimely pursuant to *R.* 3:22-12. *Id.*

See In re Readoption of Death Penalty Regulations, 367 *N.J.Super.* 61 (App. Div. 2004) (remand to the Department of Corrections to further consider several of its regulations implementing the statute for carrying out a lethal injection).

VII. PROPORTIONALITY

A. Individual Proportionality Review

Defendant's death sentence was disproportionate to those of similarly situated defendants. *State v. Papasavvas*, 170 *N.J.* 462 (2002).

VIII. POST-CONVICTION RELIEF

Defendant's trial counsel were effective at both the guilt and penalty phases of trial, and defendant presented no evidence to support his claim of mental retardation. *State v. Harris*, 181 *N.J.* 391 (2004). Indeed, defendant's penalty phase expert had testified at trial that defendant was not retarded. *Id.* To prove mental retardation, a defendant at the post-conviction proceeding must (1) come forward with some evidence of retardation; and (2) if he or she does, an adversarial hearing must be conducted to satisfy due process requirements. *Id.*

No disqualification of the entire county prosecutor's office was required based on the mere allegation of misconduct of some members. *State v. Harvey,* 176 *N.J.* 522 (2003).

Defendant failed to prove that counsel was ineffective during the penalty phase; counsel conducted sufficient investigation into potential mitigation evidence. *State v. DiFrisco*, 174 *N.J.* 195 (2002), *cert. denied*, 537 *U.S.* 1220 (2003). Evidence deemed mitigating in hindsight would have opened the door to damaging rebuttal evidence. Also, defendant had no right to the effective assistance of expert witnesses, and could only couch this claim in terms of effectiveness of counsel who obtained the experts. *Id.*

CAUSATION

III. CULPABILITY

B. Reckless or Criminally Negligent Conduct

As a matter of law, removal of life support from a non-brain dead victim raises no causation or intervening cause issues in a death by auto case. *State v. Pelham*, 176 *N.J.* 448 (2003).

CONSPIRACY (*See also* ACCOMPLICE LIABILITY, COMPLICITY, EVIDENCE)

III. CONSPIRACIES WITH MULTIPLE OBJECTIVES

Fraud scheme between defendant and psychiatrist resembled multiple, separate conspiracies model of *Kotteakos v. United States*, 328 *U.S.* 750 (1946), not the single, all-encompassing conspiracy model of *Blumenthal v. United States*, 332 *U.S.* 539 (1947). *State v. Decree*, 343 *N.J.Super.* 410 (App. Div.), *certif. denied*, 170 *N.J.* 388 (2001).

CONTEMPT

I. INDICTABLE CONTEMPT

See State v. Finamore, 338 *N.J.Super.* 130 (App. Div. 2001).

B. Current Examples of Indictable Contempt

7. Defendant was guilty of contempt for violating a telephonic domestic violence TRO that did not comply with the recording rule (*R.* 5:7A(b)). *State v. Masculin,* 355 *N.J. Super.* 250 (Law Div. 2001). The failure to record a telephonic TRO, while constituting a procedural deficiency, does not void that civil order where the applicant was sworn. *Id.*
8. Juvenile could not be adjudicated delinquent for contempt when she violated a court order to obey the rules of home and school. *State in re S.S.*, 367 *N.J.Super.* 400 (App. Div.), *certif.granted*, 181 *N.J.* 544 (2004). It was contrary to the Code of Juvenile Justice for a juvenile status offender to be adjudicated delinquent for contempt without having committed any other act prohibited by the Code of Criminal Justice. *Id.* And *N.J.S.A.* 2C:29-9 was not intended as a means of enforcement in juvenile proceedings. *Id.*

II. PUNITIVE CONTEMPT

A. Contempt in *Facie Curiae*

2. Rules Governing Contempt in *Facie Curiae*
See Amoresano v. Laufgas, 171 *N.J.* 532 (2002) (summary contempt before the court under *R.* 1:10-1 based on letters and recusal motions defendant sent the trial judge claiming corruption and partiality).
3. Procedure for Dealing with Contempt in *Facie Curiae*
See Amoresano v. Laufgas, 171 *N.J.* 532 (2002).
5. Scope of Appellate Review
Appellate court must review record and make a *de novo* determination. *Amoresano v. Laufgas*, 171 *N.J.* 532 (2002).
7. Examples of Contempt in *Facie Curiae*
Letters and motions accusing trial judge of corruption and partiality qualifies. *Amoresano v. Laufgas*, 171 *N.J.* 532 (2002).

B. Contempt Outside the Presence of the Court

2. Rules Governing Contempt Outside the Presence of the Court
Defendant must be given the opportunity to cross-examine State witnesses at the contempt hearing pursuant to *R.* 1:10-2. *Amoresano v. Laufgas*, 171 *N.J.* 532 (2002).
3. Examples of Contempt Outside the Presence of the Court
Intimidating statements said to a witness and an attorney were contumacious. *Amoresano v. Laufgas*, 171 *N.J.* 532 (2002).

CONTROLLED DANGEROUS SUBSTANCES (*See also* SEARCH AND SEIZURE)

II. CONSTITUTIONALITY

D. *N.J.S.A.* 2C:35-7.1
See State v. Brooks, 366 *N.J.Super.* 447 (App. Div. 2004).

G. *N.J.S.A.* 2C:35-7, 12, 14 and 15
See State v. Murray, 338 *N.J.Super.* 80 (App. Div.), *certif. denied*, 169 *N.J.* 608 (2001).

H. *N.J.S.A.* 2C:35-19
Defendant shoulders no burden to detail his or her objections to a laboratory report's admission, and once a timely objection is made the State must either produce an expert witness at trial to testify or prove at a hearing the testing procedure's reliability. *State v. Miller*, 170 *N.J.* 417 (2002).
See State v. Simbara, 175 *N.J.* 37 (2002) (State had established laboratory certificate's admissibility, but defendant could confront analyst who prepared it).

III. SUFFICIENCY OF EVIDENCE

A. Possession Generally

Defendant's arrest on the street, before police entered and searched his apartment with a warrant and discovered a gun, did not preclude his conviction pursuant to *N.J.S.A.* 2C:39-4.1a because his apartment was the crime scene, he had the ability to control the drugs and gun in his apartment, and the statute's rationale is to deter drug dealers with firearms. *State v. Harrison*, 358 *N.J.Super.* 578 (App. Div. 2003), *aff'd,* 179 *N.J.* 229 (2004).

B. Constructive Possession/Circumstantial Evidence

Defendant, arrested outside his apartment as police searched it and found drugs and a loaded gun, constructively possessed both. *State v. Spivey*, 179 *N.J.* 229 (2004). The closer in proximity a gun is to drugs, the stronger the inference that the two are related to a common purpose. *Id.*

C. School/Public Places Zones

State may present sufficient evidence to gain an *N.J.S.A.* 2C:35-7.1 conviction even without introducing the ordinance approving the map used to designate the drug-free public housing zone. *State v. Trotman*, 366 *N.J.Super.* 226 (App. Div. 2004). But it need not prove that the public housing authority held a valid title to the units so long as the property is used as a public housing facility. *Id.*

See State v. Brooks, 366 *N.J.Super.* 447 (App. Div. 2004).

IV. TRIAL-RELATED ISSUES

A. Elements/Basis for Prosecution

6. Employing a Juvenile

See State v. Lassiter, 348 *N.J.Super.* 152 (App. Div. 2002) (State must prove principal in drug distribution scheme was 18 years or older at the time of the drug sale).

B. Expert Testimony

See State v. Summers, 176 *N.J.* 306 (2003) (reaffirming that, pursuant to *State v. Odom*, 116 *N.J.* 65 (1989), State's expert witness can testify in the context of a hypothetical question that an individual possessed drugs with the intent to distribute).

V. SENTENCING

B. Plea Agreements/Attorney General Guidelines/Cooperation Agreements

Post-*Brimage* Attorney General Guidelines in negotiating cases under *N.J.S.A.* 2C:35-12 generally should be applied prospectively to all pending cases, including those where defendant committed an offense pre-*Brimage* but pled guilty and was sentenced post-*Brimage*. An exception would exist where applying the post-*Brimage* guidelines would result in a harsher parole disqualifier, however. *State v. Fowlkes*, 169 *N.J.* 387 (2001).

See State v. Rolex, 167 *N.J.* 447 (2001) (effect of "no appearance/no waiver" provisions in school zone plea agreement cases in different counties).

Remand may be necessary if the trial court record is silent as to use of *Brimage* guidelines in arriving at defendant's sentence for pleading guilty to possessing cocaine. *State v. Hammer*, 346 *N.J.Super.* 359 (App. Div. 2001).

VI. MISCELLANEOUS

Defendant tampered with evidence when he shook a bag of cocaine out of a moving vehicle while police pursued him, thereby preventing officers from retrieving it. *State v. Mendez*, 175 *N.J.* 201 (2002).

COURTS

II. MANAGEMENT OF THE TRIAL

A. Public Trial - Access of the Press (*See also* **SIXTH AMENDMENT**)

Trial court improperly excluded victim's and defendant's families from the courtroom, which violated defendant's Sixth Amendment right to a public trial. *State v. Cuccio*, 350 *N.J.Super.* 248 (App. Div.), *certif. denied*, 174 *N.J.* 43 (2002).

D. Conduct of Trial Judge

1. Judge's Authority to Examine Witnesses

Judge did not assume advocate's role in questioning a defense witness. *State v. Medina*, 349 *N.J.Super.* 108 (App. Div.), *certif. denied*, 174 *N.J.* 193 (2002).

2. *Ex Parte* Communications Between Judge and Jurors or Witnesses

See State v. Brown, 362 *N.J.Super.* 180 (App. Div. 2003).

3. Remarks and Conduct of Trial Judge

Trial court cannot permit an individual to sit as a juror after that juror has revealed her bias. *State v. Tyler*, 176 *N.J.* 171 (2003). Prejudice is presumed by leaving the person in the jury box as punishment for trying to avoid jury service, and denies defendant the right to a fair and impartial jury. *Id.*

4. *Voir Dire*

While the trial court should have asked defendant's requested *voir dire* questions, the questions asked sufficiently explored areas of possible prejudice and resulted in a fair and impartial jury. *State v. Hill*, 365 *N.J.Super.* 463 (App. Div.), *certif. granted o.g.* 179 *N.J.* 373 (2004).

See State v. Jones, 346 *N.J.Super.* 391 (App. Div.), *certif. denied*, 172 *N.J.* 181 (2002).

E. Mistrial (*See also* **DOUBLE JEOPARDY**)

No mistrial was mandated when, during deliberations, it was discovered that a juror had prior criminal convictions; juror was removed and replaced by an alternate. *State v. Farmer*, 366 *N.J.Super.* 307 (App. Div.), *certif. denied*, 180 *N.J.* 456 (2004).

No mistrial was required, and a curative instruction was proper, where unrelated evidence of defendant's physical abuse of the child sexual assault victim arose. *State v. L.P.*, 352 *N.J.Super.* 369 (App. Div.), *certif.denied*, 174 *N.J.* (2002).

Defendant could be retried after two mistrials. *State v. Jenkins*, 349 *N.J.Super.* 464 (App. Div.), *certif. denied*, 174 *N.J.* 43 (2002). The jury remains a deliberating one until the court accepts the verdict and discharges the panel, and a verdict is not reached when a foreperson claims that one is. *Id.*

Mid-trial mistrial was improperly granted *sua sponte* based on the dismissal of two jurors and the prosecutor's vacation. *State v. Georges*, 345 *N.J.Super.* 538 (App. Div. 2001), *certif. denied*, 174 *N.J.* 41 (2002).

Mid-trial mistrial was improperly granted when a witness refused to answer the State's questions. *State v. Allah*, 170 *N.J.* 269 (2002).

Curative instruction, not a mistrial, was the proper remedy for a witness' improper comment that he was "locked in the same barracks" as defendant. *State v. Denmon*, 347 *N.J.Super.* 457 (App. Div.), *certif. denied*, 174 *N.J.* 41 (2002).

See State v. Brown, 362 *N.J.Super.* 180 (App. Div. 2003).

F. Motions for Judgment of Acquittal (*See also* **APPEALS, DOUBLE JEOPARDY**)

The State presented sufficient evidence for defendant's child luring and attempted endangering convictions -- the act of endeavoring, or trying, to get a child into a car constitutes child luring, and defendant's statement illustrated that his purpose was to engage in a prohibited sexual offense with the child. *State v. Perez*, 177 *N.J.* 540 (2003).

See State in re G.B., 365 *N.J.Super.* 179 (App. Div. 2004) (no evidence proved sexual contact done with the purpose of degrading or humiliating the victim or sexually arousing or gratifying the juvenile); *State v. Stafford*, 365 *N.J.Super.* 6 (App. Div. 2003) (sufficient evidence supported defendant's convictions for violating township ordinance prohibiting the feeding of migratory waterfowl); *State v. Lassiter*, 348 *N.J.Super.* 152 (App. Div. 2002) (as to accomplice liability for employing a juvenile to distribute drugs).

G. Instructions to the Jury

1. Requests to Charge

Defendant asked for the model jury charge on identity regarding the use of police photographs, and the trial court should have issued it. *State v. Swint*, 364 *N.J.Super.* 236 (App. Div. 2003).

2. Content - In General

Defendants charged only with possession of a weapon by a convicted person do not receive a bifurcated trial. Thus the rule in *State v. Ragland*, 105 *N.J.* 189 (1986), does not extend to bifurcation of elements of a single charge. *State v. Brown*, 180 *N.J.* 572 (2004). The jury should receive appropriate limiting instructions to decrease the risk of undue prejudice; sanitization of the predicate offense would lessen the potential for prejudice. *Id.*

The courts should not instruct juries that stipulations bind their fact findings on those issues. *State v. Wesner*, 372 *N.J.Super.* 489 (App. Div. 2004). Rather, judges should instruct the jury that (1) the parties have agreed to certain facts, and that the jury should

treat these facts as being undisputed, *i.e.*, the parties agree that these facts are true, and (2) as with all evidence, undisputed facts can be accepted or rejected by the jury in reaching a verdict. *Id.*

Trial court's suggestion to jurors, at approximately 4:30 p.m. on a Friday during deliberations, that they end deliberations for the day and come back on Monday unless there were close to a verdict did not coerce or compromise the verdict. *State v. Barasch*, 372 *N.J.Super.* 355 (App. Div. 2004).

Trial court's instructions as to failure to remit collected state taxes were proper. *State v. Barasch*, 372 *N.J.Super.* 355 (App. Div. 2004). The State need not prove that defendant's failure to remit was with the purpose to evade or avoid payment. *Id.*

Model fresh complaint and CSAAS jury instructions had the capacity to confuse the jury regarding how to evaluate the child victim's credibility vis-a-vis a delayed disclosure of abuse. *State v. P.H.*, 178 *N.J.* 378 (2004). But so long as the jury is charged that silence or delay in and of itself is not inconsistent with a claim of abuse, the proper balance is struck. *Id.*

Trial court did not properly instruct the jury on the potential grade-enhancing elements of flight and physical force in a resisting arrest prosecution. *State v. Simms*, 369 *N.J.Super.* 466 (App. Div. 2004).

Defendant entitled to assert a "mistake of fact" defense because he claimed that he believed the suitcase he possessed contained stolen furs, not 33 pounds of cocaine. *State v. Pena*, 178 *N.J.* 297 (2004). Thus the trial court should have instructed the jury as to the non-lesser-included offense of receiving stolen property. *Id.*

Trial court erred in *N.J.S.A.* 2C:39-4.1 instruction in setting forth the enumerated offense. *State v. Holden*, 364 *N.J.Super.* 504 (App. Div. 2003).

Trial court erred in limiting the jury's use of Battered Woman's Syndrome evidence in relation to defendant's duress defense for having sexual intercourse with her 7-year-old stepson at her husbands's behest. *State v. B.H.*, 364 *N.J.Super.* 171 (App. Div. 2003), *certif. granted*, 179 *N.J.* 311 (2004). Thus the jury could have considered evidence of the syndrome, as part of defendant's "situation," in determining what a reasonable person in that situation would have done when faced with alleged coercion. *Id.*

Lack of an alibi instruction was not plain error. *State v. Swint*, 364 *N.J.Super.* 236 (App. 2003).

Despite defendant's failure to object at trial and the fact that the defense evidence of misidentification was "thin," plain error arose when the trial court did not instruct the jury as to the State's burden to prove identification. *State v. Davis*, 363 *N.J.Super.* 556 (App. Div. 2003).

Defendant's racketeering and theft by extortion convictions were reversed because the trial court failed to instruct the jury regarding the territorial elements of these offenses. *State v. Casilla*, 362 *N.J.Super.* 554 (App. Div.), *certif. denied*, 178 *N.J.* 251 (2003). Here it was unclear whether the conduct forming the basis for his attempted theft by extortion occurred in New Jersey, and whether the racketeering enterprise in which he participated affected trade or commerce in New Jersey. *Id.* Also, the trial court failed to instruct the jury as to the "failure to release the victim unharmed and in a safe place" element of first degree kidnapping despite the fact that the jurors properly convicted defendant of murdering his victim. *Id.*

The trial court erred in charging the jury on endangering the welfare of children because *N.J.S.A.* 2C:24-4b does not apply to virtual child pornography images or pornography involving young-looking adults. *State v. May*, 362 *N.J.Super.* 572 (App. Div. 2003). Also, the State had to prove beyond a reasonable doubt that the images on defendant's computer were of real children and that he knew this. *Id.* The instructions given were clear that the State had to prove the ages of those depicted, but in future cases trial courts must examine each image to determine which can be evaluated based on the jury's common knowledge and which require expert testimony to assist the jury in deciding if the person depicted is older or younger than sixteen. *Id.*

Trial court should not include certain language regarding "materiality" not found in the model jury charge on perjury. *State v. Neal*, 361 *N.J.Super.* 522 (App. Div. 2003).

Charge as to aggravated sexual assault by a person in a supervisory position is to include a discussion of whether a significant age disparity or maturity existed between the victim and defendant, what role the athletic activity (this case involved a sports coach) played in the victim's life, what extent the coach offered guidance and advice to the victim on questions and issues outside athletics, and the coach's power to affect the victim's future athletic participation. *State v. Buscham*, 360 *N.J.Super.* 346 (App. Div. 2003). Also, the trial court failed to issue a fresh complaint instruction. *Id.*

Cautionary instructions are to be issued regarding the prosecutor's replay of videotaped trial testimony during summation. *State v. Muhammad*, 359 *N.J.Super.* 361 (App. Div.), *certif. denied,* 178 *N.J.* 36 (2003).

Trial court correctly defined "physical force or violence" in response to a jury question regarding the resisting arrest instructions. *State v. Brannon*, 178 *N.J.* 500 (2004).

Trial court erred in denying defendant's request to charge the ordinary "irregularity" defense of *N.J.S.A.* 2C:29-5d. *State v. Moultrie*, 357 *N.J. Super.* 547 (App. Div. 2003). Therefore the State has the burden of disproving both elements of the defense in its case-in-chief. *Id.*

Trial court should have, due to the facts involved, fashioned a charge as to "simulated possession of a weapon" in its robbery instructions. *State v. Harris*, 357 *N.J.Super.* 532 (App. Div. 2003).

Specific unanimity charge is needed if two theories of guilt are based on different acts and evidence. *State v. Frisby*, 175 *N.J.* 583 (2002).

Charge properly guided the jury in considering the Battered Woman's Syndrome and defendant's self-defense and passion/provocation manslaughter claims. *State v. Tierney*, 356 *N.J.Super.* 468 (App. Div.), *certif. denied,* 176 *N.J.* 72 (2003). Defense counsel vigorously argued self-defense in summation, and in doing so incorporated the syndrome. *Id.*

Jury charge contrasting purposeful conduct with accidental conduct as to resisting arrest and aggravated assault diluted the "purposeful" element of both crimes. *State v. Ambroselli*, 356 *N.J.Super.* 377 (App. Div. 2003). It also failed to discuss those culpability levels -- knowing, reckless, and negligent -- in between. *Id.*

Jury instruction in official misconduct case was proper where the trial court charged that a police officer's duties include the mandate to arrest those committing crimes the officer observed. *State v. Corso*, 355 *N.J.Super.* 518 (App. Div. 2002), *certif. denied,* 175 *N.J.* 547 (2003). Here defendant, an off-duty police officer, gave an individual Ecstacy pills to sell. *Id.*

Trial court correctly instructed the jury that it could consider a witness' failure to disclose evidence at a previous time both in evaluating credibility and as substantive evidence -- here defendant made a pre-arrest statement omitting her trial accusation against the child victim's father for endangering their two-year-old son's welfare. *State v. N.A.*, 355 *N.J.Super.* 143 (App. Div. 2002), *certif. denied,* 175 *N.J.* 434 (2003).

Penalty-phase instructions in a capital case on the possibility of a non-unanimous verdict, although not perfect, did not mislead the jury. *State v. Marshall*, 173 *N.J.* 343 (2002).

Some jurors, due to an ambiguous verdict sheet in a capital case, may have considered an aggravating factor not unanimously found. *State v. Nelson*, 173 *N.J.* 417 (2002).

While accomplice liability instructions related the relevant legal principles, the jury's ambiguous question showed its lack of understanding of this theory. *State v. Savage*, 172 *N.J.* 374 (2002).

Courts should not instruct jurors in child sexual assault cases that they can disregard the delay in reporting defendant's attacks. *State v. P.H.*, 178 *N.J.* 378 (2004).

Trial court correctly instructed the jury that removal of life support from a victim who was not brain-dead did not constitute an intervening cause of death that would insulate defendant from criminal liability for death by auto. *State v. Pelham*, 176 *N.J.* 448, *cert. denied*, 540 *U.S.* 909 (2003).

Trial court should relate the facts to the law in crafting the instructions, and tailor the charge to the parties' factual hypotheses. *State v. Jones*, 346 *N.J.Super.* 391 (App. Div.)

(as to "taking" component of interference with custody charge), *certif. denied*, 172 *N.J.* 181 (2002).

No need exists to define commonly understood terms, such as "obtain." *State v. Gaikwad*, 349 *N.J.Super.* 62 (App. Div. 2002). Also, the jury's verdict proved proper application of the term "electronic communications." *Id.*

Trial court did not direct the jury to convict in its instructions, but rather merely outlined the charges. *State v. D.V.*, 348 *N.J.Super.* 107 (App. Div.), *aff'd. o.b.* 176 *N.J.* 338 (2003).

Murder instructions were erroneous because they permitted the jury to find that the homicide itself inferred that defendant's purpose was to kill or cause serious bodily injury resulting in death. *State v. Chavies*, 345 *N.J.Super.* 254 (App. Div. 2001).

Luring instructions were faulty because the trial court permitted the jury "unbridled autonomy" in deciding defendant's criminal purpose; the Legislature conditioned culpability on a purpose to commit a criminal offense -- not mere disorderly or petty disorderly persons offenses -- with or against a child. *State v. Olivera*, 344 *N.J.Super.* 583 (App. Div. 2001).

Terroristic threats under *N.J.S.A.* 2C:12-3a include that defendant "threatens to commit any crime of violence," and the jury instructions must guide the jurors on the qualitites of this element and explain the elements and definitions of such crimes. *State v. MacIlwraith*, 344 *N.J.Super.* 544 (App. Div. 2001). This is particularly essential if the only other convictions involving the facts of the terroristic threats charge result in but petty disorderly persons convictions. *Id.*

Trial court sufficiently instructed the jury on the degrees of recklessness for aggravated assault and assault by auto, and no charge defining defendant's negligence and carelessness theories, or how intoxication evidence related to recklessness, was required. *State v. Pigueiras*, 344 *N.J.Super.* 297 (App. Div. 2001), *certif. denied*, 171 *N.J.* 337 (2002).

See State v. Rodriguez, 365 *N.J.Super.* 38 (App. Div. 2003) (no error in insanity charge, which tracked the model jury charge), *certif. denied*, 180 *N.J.* 150 (2004); *State v. Romano,* 355 *N.J.Super.* 21 (App. Div. 2002) (State must disprove beyond a reasonable doubt affirmative defense of necessity once defendant comes forward with some evidence of it); *State v. T.C.*, 347 *N.J.Super.* 219 (App. Div. 2002) (general unanimity instruction sufficient where the jury is presented with one theory involving conceptually similar acts), *certif. denied*, 177 *N.J.* 222 (2003); *State v. Shelton*, 344 *N.J.Super.* 505 (App. Div. 2001) (reasonable doubt charge proper), *certif. denied*, 171 *N.J.* 43 (2002).

3. Lesser-Included Offenses

No rational basis existed to charge passion/provocation manslaughter as a lesser-included offense of murder. *State v. Abdullah*, 372 *N.J.Super.* 252 (App. Div. 2004).

Trial court erred in submitting lesser-included criminal sexual contact charge to the jury without objection because the evidence did not clearly indicate its appropriateness. *State v. Muhammed*, 366 *N.J.Super.* 185 (App. Div.), *certif. granted*, 180 *N.J.* 151 (2004).

Failure to charge on lesser-included offenses of simple assault, terroristic threats, and theft invalidated defendant's robbery conviction. *State v. Harris,* 357 *N.J.Super.* 532 (App. Div. 2003).

Trial court erred in charging joyriding as a lesser-included offense of theft, over defendant's objection, because it is not such an offense. *State v. Roberson*, 356 *N.J.Super.* 332 (Law Div. 2002).

Failure to charge requested lesser-included offense of criminal restraint invalidated defendant's felony murder and kidnapping convictions. *State v. Savage*, 172 *N.J.* 374 (2002).

Trial court should have charged theft of services as a lesser-included offense of robbery where defendant failed to pay a cab fare, walked away, and then threatened the cab driver who followed him and demanded his fare. *State v. Grissom*, 347 *N.J.Super.* 469 (App. Div. 2002).

See State v. Jenkins, 178 *N.J.* 347 (2004) (despite defendant's express request that no lesser-included offenses of murder be charged to the jury, trial court erred in acceding to

this request because the facts clearly indicated that a manslaughter verdict was possible); *State v. Muhammed*, 366 *N.J.Super.* 185 (App. Div.) (trial court erred in submitting lesser-included criminal sexual contact charge to the jury without objection), *certif. granted*, 180 *N.J.* 151 (2004); *State v. N.A.*, 355 *N.J.Super.* 143 (App. Div. 2002) (defendant not entitled to any lesser-included offense charge pursuant to *N.J.S.A.* 9:6-3), *certif. denied, 175 N.J.* 434 (2003); *State v. Taylor,* 350 *N.J.Super.* 20 (App. Div.) (trial court erred in not charging passion/provocation manslaughter *sua sponte*), *certif. denied*, 174 *N.J.* 190 (2002); *State v. Gaikwad*, 349 *N.J.Super.* 62 (App. Div. 2002) (no rational basis to charge wrongful access to a computer under *N.J.S.A.* 2C:20-32); *State v. Viera*, 346 *N.J.Super.* 198 (App. Div. 2001) (attempted possession/provocation manslaughter as a lesser-included offense of attempted murder), *certif. denied*, 174 *N.J.* 38 (2002); *State v. Hammond,* 338 *N.J.Super.* 330 (App. Div.), *certif. denied*, 169 *N.J.* 609 (2001).

5. Further Deliberations
   See State v. DiFerdinando, 345 *N.J.Super.* 382 (App. Div. 2001), *certif. denied*, 171 *N.J.* 338 (2002).
7. Defendant's Election Not to Testify
   Failure to give a requested no-adverse-inference charge is constitutional, but not structural, error; thus harmless error analysis applies. *Lewis v. Pinchak*, 348 *F.*3d 355 (3d Cir. 2003), *cert. denied*, 124 *S.Ct.* 1461 (2004).
11. Other-Crimes Limiting Instruction
    Even a less-than-perfect limiting instruction, to which defendant never objected, contained the essential point that other-crimes evidence cannot be used for propensity purposes. *State v. T.C.*, 347 *N.J.Super.* 219 (App. Div. 2002), *certif. denied*, 177 *N.J.* 222 (2003). *See State v. Burris*, 357 *N.J.Super.* 326 (App. Div. 2002) (instructions properly limited jury's consideration of other-crimes evidence), *certif. denied,* 176 *N.J.* 279 (2003).
12. Expert Witnesses
    See State v. Summers, 350 *N.J.Super.* 353 (App. Div. 2002), *aff'd*, 176 *N.J.* 306 (2003).
13. Identification
    A. Generally
       The trial judge's misstatement that witnesses made an in-court identification was harmless given the full charge and the facts before the jury. *State v. Wilson*, 362 *N.J.Super.* 319 (App. Div.), *certif. denied*, 178 *N.J.* 250 (2003). Defendant also made no request for a factually "tailored" identification instruction, and the charge on possession of a handgun for unlawful purposes was proper. *Id.*
       See State v. King, 372 *N.J.Super.* 227 (App. Div. 2004) (although trial court should have given an identification charge, no plain error existed).
    B. Cross-Racial
       A cross-racial identification instruction cannot be withheld merely because of relative skin tones (Hispanic victim's skin was darker than African-American defendant's). *State v. Walton*, 368 *N.J.Super.* 298 (App. Div. 2004). Thus the trial court should have granted defendant's request for a cross-racial identification charge. *Id.*
       No basis in the record existed for a cross-racial identification instruction, and no basis in the case law existed for cross-ethnic instruction. *State v. Valentine*, 345 *N.J.Super.* 490 (App. Div. 2001), *certif. denied*, 171 *N.J.* 338 (2002); *see State v. Dixon*, 346 *N.J.Super.* 126 (App. Div. 2001) (correct identification and cross-racial identification charges), *certif. denied*, 172 *N.J.* 181 (2002).
       See State v. Ways, 180 *N.J.* 171 (2004).

H. Questions by the Jury
   1. As to Jury Instructions
      Trial court appropriately responded to jury's questions during deliberations, and defendant had no objections. *State v. Wilson*, 362 *N.J.Super.* 319 (App. Div.), *certif. denied*, 178 *N.J.* 250 (2003).
   2. Reading Testimony to the Jury
      Readbacks must occur in open court and on the record with the judge, counsel, and defendant present. *State v. Brown*, 362 *N.J.Super.* 180 (App. Div. 2003). Here, the court reporter and counsel went into the jury room and did the readback over defense

counsel's objection, and the trial judge explained to the jurors *ex parte* what would happen. This constituted structural error. *Id.*

I. Receiving the Jury's Verdict

1. Consistency

See State in re J.P.F., 368 *N.J.Super.* 24 (App. Div.), *certif. denied*, 180 *N.J.* 343 (2004); *State v. Gaikwad*, 349 *N.J.Super.* 62 (App. Div. 2002).

2. Molding the Verdict (*See also* **THEFT**)

Choice given to State to accept molded verdict to lesser-included offense instead of retrying defendant. *State v. Viera*, 346 *N.J.Super.* 198 (App. Div. 2001), *certif. denied*, 174 *N.J.* 38 (2002).

III. POST-TRIAL MOTIONS

A. Motion for Judgment of Acquittal After Discharge of Jury (*See R.* 3:18-2, "Motion After Discharge of Jury")

Sufficient evidence supported defendant's conviction for violating *N.J.S.A.* 2C:35-7.1. *State v. Brooks*, 366 *N.J.Super.* 447 (App. Div. 2004).

Defendant's possession of a firearm for unlawful purposes conviction was vacated because it was inconsistent with the acquittals. *State v. Banko*, 364 *N.J.Super.* 210 (App. Div. 2003).

Trial court erroneously reduced defendant's second degree official misconduct conviction to one of the third degree; the benefit defendant had obtained was the money he took for his own use and then returned months later, and not merely the interest that could have been earned on it during that time period. *State v. Cetnar,* 341 *N.J.Super.* 257 (App. Div.), *certif. denied*, 170 *N.J.* 89 (2001).

B. Motion for New Trial

See State v. Brooks, 366 *N.J.Super.* 447 (App. Div. 2004); *State v. Peterson*, 364 *N.J.Super.* 387 (App. Div. 2003) (based on DNA testing pursuant to *N.J.S.A.* 2A:84A-32a); *State v. Petrozelli*, 351 *N.J.Super.* 14 (App. Div. 2002) (based on ineffective assistance of counsel).

2. Based Upon Weight of the Evidence

Criminal sexual assault conviction was not against the weight of the evidence. *State in re J.P.F.*, 368 *N.J.Super.* 24 (App. Div.), *certif. denied*, 180 *N.J.* 343 (2004).

Claim that evidence did not support kidnapping conviction because victim was not confined for a substantial period could be raised, despite *R.* 2:10-1, for first time on appeal. *State v. Soto,* 340 *N.J.Super.* 47 (App. Div.), *certif. denied*, 170 *N.J.* 209 (2001).

See State v. DiFerdinando, 345 *N.J.Super.* 382 (App. Div. 2001), *certif. denied*, 171 *N.J.* 338 (2002).

4. Based Upon Newly Discovered Evidence

Hearing needed on new trial motion where defendant, tried *in absentia*, was found incarcerated in a New York federal prison. *State v. Givens*, 353 *N.J.Super.* 280 (App. Div. 2002). Incarceration is not a *per se* involuntary waiver of appearance for trial. *Id.*

IV. RESTRICTIONS PLACED UPON JUDGES

A. Disqualification

Although no actual bias on the trial judge's part mandated recusal, certain findings made suggested that the trial should proceed before a different judge. *State v. Gomez,* 341 *N.J.Super.* 560 (App. Div.), *certif. denied*, 170 *N.J.* 86 (2001). Trial judge's prior involvement in prosecuting defendant on other crimes created a conflict of interest that defendant could not waive, and required recusal. *State v. Kettles*, 345 *N.J.Super.* 466 (App. Div. 2001), *certif. denied*, 171 *N.J.* 443 (2002).

No basis existed for the trial judge to recuse himself *sua sponte* simply because he adjudicated pretrial motions and reviewed grand jury transcripts. *State v. Medina*, 349 *N.J.Super.* 108 (App. Div.), *certif. denied*, 174 *N.J.* 193 (2002).

CRUEL AND UNUSUAL PUNISHMENT

NERA does not impose cruel and unusual punishment. *State v. Johnson*, 166 *N.J.* 523 (2001); *State v. Shoats,* 339 *N.J.Super.* 359 (App. Div. 2001).

III. DEATH PENALTY (*See also* **CAPITAL PUNISHMENT**)

Executing the mentally retarded violates the Eighth Amendment. *Atkins v. Virginia*, 536 *U.S.* 304 (2002).

See State in re Readoption of Death Penalty Regulations, 367 *N.J.Super.* 61 (App. Div. 2004) (challenges to Department of Corrections regulations implementing death sentence).

DEFENSES (*See also* **ALIBI, INSANITY, INTOXICATION, SELF-DEFENSE**)

I. GENERALLY

See State v. Pelham, 176 *N.J.* 448 (defendant's criminal liability not lessened by victim's subsequent decision to disconnect life support), *cert. denied*, 540 *U.S.* 909 (2003); *State v. May*, 362 *N.J.Super.* 572 (App. Div. 2003) (defendant claimed that computer images were of dolls and "virtual" children in endangering the welfare of children case).

II. MISTAKE OF FACT OR LAW

B. Ignorance or Mistake Negating an Element of the Offense

See State v. Pena, 178 *N.J.* 297 (2004).

IV. DURESS

A. Generally

Trial court erred in limiting the jury's use of battered woman's syndrome evidence as it related to defendant's duress defense. *State v. B.H.*, 364 *N.J.Super.* 171 (App. Div. 2003), *certif. granted*, 179 *N.J.* 311 (2004).

VI. DE MINIMIS INFRACTIONS

A. Generally

Shoplifting is a serious offense, and an attempt to trivialize it pursuant to monetary value is "fraught with potential dangers" because it could be seen as authority to shoplift below a certain amount. *State v. Evans*, 340 *N.J.Super.* 244 (App. Div. 2001).

VII. ENTRAPMENT

B. Due Process Entrapment

The evidence indicated very little "inducement" by the informant and very little resistance by defendant, and thus no entrapment existed. *State v. Brooks*, 366 *N.J.Super.* 447 (App. Div. 2004).

VIII. NECESSITY AND JUSTIFICATION

A. Generally

See State v. Tierney, 356 *N.J.Super.* 468 (App. Div.) ("imperfect" self-defense is not a recognized defense, although it can be relevant to the required state of mind), *certif. denied,* 176 *N.J.* 72 (2003).

B. Procedural Issues and Burden of Proof

State must disprove affirmative defense of necessity beyond a reasonable doubt when defendant offers some evidence of it. *State v. Romano*, 355 *N.J.Super.* 21 (App. Div. 2002). Trial courts must explain that while a reasonable belief in the need to defend oneself was required to justify conduct as to aggravated assault, an honest but unreasonable belief could negate the mental state for possession of a weapon for unlawful purposes. *State v. McLean*, 344 *N.J.Super.* 61 (App. Div. 2001), *certif. denied*, 172 *N.J.* 179 (2002).

DISCOVERY (*See also* **SUBPOENAS**)

I. DISCOVERY BY DEFENDANT

C. Confidential and Secret Materials

9. Racial Profiling

Federal defendants seeking discovery on selective prosecution claims must meet the standards of *United States v. Armstrong*, 517 *U.S.* 456 (1996). *United States v. Bass*, 536 *U.S.* 862 (2002).

Appellate Division ordered a remand before the statewide judge despite no proof in the record as to racial profiling. *State v. Francis*, 341 *N.J.Super.* 67 (App. Div. 2001). Defendants preserve a racial profiling claim merely by challenging in a suppression proceeding the consent they gave to troopers to search, even if no profiling claim itself was made before the trial court. *State v. Payton,* 342 *N.J.Super.* 106 (App. Div. 2001). But the *Interim Report* did not acknowledge profiling by agencies other than the State Police, and thus defendant could not use it to meet the discovery threshold for an alleged profile stop by Port Authority officers. Indeed, courts may not take judicial notice of the *Report's* contents in non-State Police cases. *State v. Halsey*, 340 *N.J.Super.* 492 (App. Div. 2001), *certif. denied*, 171 *N.J.* 443 (2002).

DISORDERLY PERSONS

III. GENERAL CONSTITUTIONAL ISSUES

C. Search and Seizure; Arrest

State v. Dangerfield, 171 *N.J.* 346 (2002) (police can arrest for disorderly and petty disorderly persons offenses committed in their presence); *State in re J.M.,* 339 *N.J.Super.* 244 (App. Div. 2001).

V. SPECIAL DISORDERLY AND PETTY DISORDERLY PERSONS STATUTES AND CASES

B. Disorderly Conduct - *N.J.S.A.* 2C:33-2

2. Offensive Language - *N.J.S.A.* 2C:33-2b

See State v. Paserchia, 356 *N.J.Super.* 461 (App. Div. 2003).

G. Disrupting Meetings and Processions - *N.J.S.A.* 2C:33-8

Defendant, who was "vociferous" and "cantankerous" at a township council meeting, was not objectively disruptive because he voiced no "fighting words," evidenced no purpose to disrupt the meeting and did not actually disrupt it, and spoke about the council's substantive conduct. *State v. Charzewski*, 356 *N.J.Super.* 151 (App. Div. 2002).

VI. ADDITIONAL DISORDERLY PERSONS OFFENSES

Defendant convicted of simple assault may not have weapons returned that were seized pursuant to a domestic violence order. *State v. Wahl*, 365 *N.J.Super.* 356 (App. Div. 2004).

DOMESTIC VIOLENCE

I. LEGISLATIVE INTENT

D. Sufficiency of the Act Allegedly Constituting Domestic Violence

2. Harassment

See H.E.S. v. J.C.S., 175 *N.J.* 309 (2003) (defendant's video surveillance of wife's own bedroom could constitute harassment).

5. Stalking

See H.E.S. v. J.C.S., 175 *N.J.* 309 (2003).

II. REMEDIES UNDER THE PREVENTION OF DOMESTIC VIOLENCE ACT

A. Jurisdiction and Venue - *N.J.S.A.* 2C:25-28a

Domestic Violence Act authorizes New Jersey courts to issue domestic violence restraining orders when the victim has fled the state to seek shelter from abuse. *State v. Reyes*, 172 *N.J.* 154 (2002). New Jersey courts have jurisdiction when domestic violence occurs out of state and defendants pursue victims seeking refuge in New Jersey. *Id.*

B. Temporary Restraining Orders

Procedural deficiencies (failure to swear complainant or to contemporaneously record testimony) rendered TRO and included warrant invalid. *State v. Cassidy*, 179 *N.J.* 150 (2004).

1. Effectiveness of a TRO

Failure to record a telephonic TRO, where the applicant is sworn, is a procedural deficiency that does not violate an indictable contempt charge. *State v. Masculin,* 355 *N.J.Super.* 250 (Law Div. 2002).

4. Notice to and Service Upon Defendant

Trial court must decide if defendant had actual notice of TRO before dismissing complaint for lack of proof of law enforcement officer's service of TRO. *State v. Mernar*, 345 *N.J.Super.* 591 (App. Div. 2001) (complainant claimed to have served a copy of TRO on defendant). When an alleged violation of a restraining order exists, the matter turns on whether actual notice was given, not the manner of service. *Id.*

C. Hearing on Domestic Violence Complaint - *N.J.S.A.* 2C:25-9

1. Timing of the Hearing

Less than 24 hours notice to defendant, and court's refusal to grant an adjournment, violate due process. *H.E.S. v. J.C.S.,* 175 *N.J.* 309 (2003).

E. Contempt Proceedings Upon a Violation of a Domestic Violence Order

See State v. Masculin, 355 *N.J.Super.* 250 (Law Div. 2002).

III. ARREST, SEARCH AND SEIZURE

A. Arrest and Filing Criminal Complaints

3. Probable Cause

To issue a search warrant under the Act, "reasonable cause" must exist that defendant has committed an act of domestic violence, possesses or has access to a firearm or other weapon, and his or her possession of or access to the weapon poses a heightened risk of injury to the victim. *State v. Johnson*, 352 *N.J.Super.* 15 (App. Div. 2002). Also, a description of the weapon and its believed location must be reasonably specified in the warrant. *Id.*

B. Seizure of Weapons

1. Searches Pursuant to the Domestic Violence Act

Procedural deficiencies in TRO rendered it and included warrant invalid. *State v. Cassidy*, 179 *N.J.* 150 (2004).

Guns seized pursuant to a domestic violence complaint must also have been seized in satisfaction of an exception to the warrant requirement to be admissible in a subsequent criminal proceeding. *State v. Perkins*, 358 *N.J.Super.* 151 (App. Div. 2003).

See State v. Wahl, 365 *N.J.Super.* 356 (App. Div. 2004).

C. Return of Seized Weapons

See State v. Wahl, 365 *N.J.Super.* 356 (App. Div. 2004).

IV. OTHER RELATED ISSUES

H. Federal Law

Defendant convicted of simple assault in a domestic violence situation was prohibited from owning or possessing any firearms shipped or transported in interstate or foreign commerce under 18 *U.S.C.A.* §922(g)(9). *State v. Wahl*, 365 *N.J.Super.* 356 (App. Div. 2004).

DOUBLE JEOPARDY, COLLATERAL ESTOPPEL AND RES JUDICATA

III. RETRIAL NOT PROHIBITED

In a trial *de novo*, the Law Division judge could rely on the trooper's observations and roadside tests of defendant for drunk driving, even though the municipal court had rejected them. *State v. Kashi*, 360 *N.J.Super.* 538 (App. Div.), *aff'd per curiam*, 180 *N.J.* 45 (2004). No double jeopardy arose because drunk driving can be proven through either of two alternative evidential methods -- proof of defendant's blood alcohol content or proof of defendant's physical condition. *Id.*

IV. RETRIAL PROHIBITED

B. Acquittals After Deliberation of Verdict

Purported appeal from an order denying a request for appointment of a special municipal prosecutor was prohibited by double jeopardy after defendants were acquitted of ordinance violations at a trial *de novo* in the Law Division. Because the State was precluded from appealing the acquittal, so too was any party in its stead. *State v. Carlson*, 344 *N.J.Super.* 521 (App. Div. 2001), *certif. denied*, 171 *N.J.* 336 (2002).

C. Dismissals Pre-Trial

Federal constitution does not prohibit reinitiation of criminal proceedings where double jeopardy has not attached and no pattern of prosecutorial harassment exists. *Stewart v. Abraham*, 275 *F.*3d 220 (3d Cir. 2001), *cert. denied*, 536 *U.S.* 958 (2002).

D. Dismissals at Trial

Trial court erred in granting mistrial *sua sponte* based on various incidents, and should not have done so absent input from the attorneys and exploration of other alternatives. *State v. Georges*, 345 *N.J.Super.* 538 (App. Div. 2001), *certif. denied*, 174 *N.J.* 41 (2002). Too, retrial would require considerable expenditures of time and resources. *Id.*

VI. MULTIPLE PUNISHMENT

Double jeopardy not applicable to civil sexually violent predator act. *Seling v. Young,* 531 *U.S.* 250 (2001).

See A.A. v. State of New Jersey, 176 *F.Supp.*2d 274 (D.N.J. 2001) (Internet Registry for Megan's Law registrants does not violate double jeopardy), *aff'd*, 341 *F.*3d 206 (3d Cir. 2003).

VIII. MISTRIALS

B. Manifest Necessity

Trial court erred in granting a mistrial mid-trial based on purported manifest necessity, and double jeopardy required indictment's dismissal. *State v. Allah*, 170 *N.J.* 269 (2002).

C. Deadlocked Juries

State can reprosecute defendant capitally when jury, at the first capital trial, could not reach a unanimous verdict as to murder. *State v. Cruz*, 171 *N.J.* 419 (2002).

IX. GOVERNMENT APPEALS

State may appeal from trial court's grant of judgment notwithstanding the verdict; defendant on notice that State intended to appeal, and thus had no expectation of finality in the sentence imposed. *State v. Cetnar*, 341 *N.J.Super.* 257 (App. Div.), *certif. denied*, 170 *N.J.* 89 (2001).

State could not untimely appeal from the trial court's imposition of probationary terms where defendant already had begun to serve those terms. *State v. Gould*, 352 *N.J.Super.* 313 (App. Div. 2002). While the State had appealed from defendant's original illegal sentence, it did not do so upon resentencing to legal terms. *Id.*

XI. FEDERAL-STATE RELATIONS AND DUAL SOVEREIGNTY

To dismiss an indictment pursuant to *N.J.S.A.* 2C:1-3f, the trial court must determine both that defendant is being prosecuted for an offense based on the same conduct in another jurisdiction and that New Jersey's interests will be adequately served by that foreign prosecution. *State v. Gruber*, 362 *N.J.Super.* 519 (App. Div.), *certif. denied*, 178 *N.J.* 251 (2003). Here the trial judge erred in dismissing defendant's New Jersey indictment for endangering based on a prior New York prosecution. *Id.*

XII. RESENTENCE AFTER APPEAL OR ON DEFENDANT'S MOTION

State timely appealed defendant's sentence pursuant to *N.J.S.A.* 2C:44-1f(2), and thus no double jeopardy principle precluded resentencing. *State v. Evers*, 368 *N.J.Super.* 159 (App. Div. 2004).

ELUDING

II. ELEMENTS AND CONSTRUCTION

Eluding is elevated to a second degree crime even where defendant's unlawful conduct creates a risk of death or injury only to himself or herself. *State v. Bunch*, 180 *N.J.* 534 (2004). The term "any person," as used in the eluding statute, does not include defendant. *Id.*

Second degree eluding does not require that defendant knowingly create a risk of death or injury to another; "knowingly" refers to the "flees or attempts to elude any police or law enforcement officer" element. *State v. Dixon*, 346 *N.J.Super.* 126 (App. Div. 2001), *certif. denied*, 172 *N.J.* 181 (2002).

"Knowingly fled or attempted to elude" language in *N.J.S.A.* 2C:29-2b was likely included to foreclose any argument that defendant, to be convicted, must successfully elude the police. *State v. Mendez*, 345 *N.J.Super.* 498 (App. Div. 2001), *aff'd*, 175 *N.J.* 201 (2002). "Purposeful" mental state applicable to law of attempt is not imported into eluding. *Id.*

Uncontested failure to define "attempt" in eluding charge was not reversible error. *State v. DiFerdinando*, 345 *N.J.Super.* 382 (App. Div. 2001), *certif. denied*, 171 *N.J.* 338 (2002).

ENDANGERING THE WELFARE OF CHILDREN

I. IMPAIRING THE MORALS OF A CHILD

B. Sufficiency

A reasonable basis existed for the jury to convict the 34-year-old defendant of child luring and attempted endangerment when he offered to give the same seventh grade girl a ride in his car on one occasion and to come to his car on another, and admitted that he was physically attracted to the child. *State v. Perez*, 177 *N.J.* 540 (2003).

Sufficient evidence existed to convict defendant of endangering the welfare of children even though he was not physically present when the crimes were committed -- defendant had telephoned the children and engaged in sexually explicit conversations with them. *State v. Maxwell*, 361 *N.J.Super.* 502 (Law Div. 2001), *aff'd*, 361 *N.J.Super.* 401 (App. Div.), *certif. denied*, 178 *N.J.* 34 (2003).

C. Evidence

See State v. VanDyke, 361 *N.J.Super.* 403 (App. Div.) (in endangering and sexual assault case, defendant could proffer evidence of child victim's school records to impeach testimony of child's mother), *certif. denied*, 178 *N.J.* 35 (2003); *State v. E.B.*, 348 *N.J.Super.* 336 (App. Div.) (trial court should have permitted defendant to offer DYFS worker's testimony that child victim's accusations of abuse were unsubstantiated), *certif. denied*, 174 *N.J.* 192 (2002).

D. Jury Instructions

See State v. D.V., 348 *N.J.Super.* 107 (App. Div.) (trial court's instructions did not direct the jury to convict defendant of endangering), *aff'd*, 176 *N.J.* 338 (2003).

II. CHILD ABUSE

See State v. N.A., 355 *N.J.Super.* 143 (App. Div. 2002), *certif. denied,* 175 *N.J.* 434 (2003).

C. Admissibility of Evidence

Police erred in relating hearsay statements of non-testifying witnesses that inferred defendant's guilt. *State v. Frisby*, 175 *N.J.* 583 (2002).

D. Jury Instruction

"Willfully forsaken," as used in *N.J.S.A.* 9:6-1 and incorporated in *N.J.S.A.* 2C:24-4, requires that defendant intend to permanently abandon a child. Thus this term must be so defined for the jury. *State v. N.I.*, 349 *N.J.Super.* 299 (App. Div. 2002).

III. CHILD PORNOGRAPHY

A. Definition

Computer image printouts of existing photographs of naked children do not give rise to second degree endangering the welfare of children convictions because they are not "reproductions" pursuant to *N.J.S.A.* 2C:24-4b(4). *State v. Sisler*, 177 *N.J.* 199 (2003). Absent proof of dissemination or intent to do so, defendant was not a seller, distributor, or manufacturer of child pornography pursuant to *N.J.S.A.* 2C:24-4b(5)(a). *Id.*

See State v. May, 362 *N.J.Super.* 572 (App. Div. 2003) (involving computer images of children).

C. Constitutionality

See State v. May, 362 *N.J.Super.* 572 (App. Div. 2003) (*N.J.S.A.* 2C:24-4b constitutional).

EVIDENCE

IV. CHARACTER EVIDENCE (*See also* BIAS, CREDIBILITY)

The interests of justice required relaxation of the strictures against specific conduct evidence pursuant to *N.J.R.E.* 608, thereby permitting use of a prior false criminal accusation to impeach a victim-witness' credibility. *State v. Guenther*, 181 *N.J.* 129 (2004). Trial courts should hold a hearing to determine, by a preponderance of the evidence, whether defendant has proven that the victim made a prior accusation alleging criminal conduct and whether that accusation was false. *Id.*

The State may not offer proof of a 16-year-old victim's virginity prior to her sexual encounter with defendant as evidence that she was unlikely to have consented to such relations; *N.J.R.E.* 404(a) prohibits such use. *State v. Burke,* 354 *N.J.Super.* 97 (Law Div. 2002).

V. CONFRONTATION *(See also* **SIXTH AMENDMENT**)

Testimonial statements of witnesses absent from trial are only admissible if the declarant is unavailable and defendant has had a prior opportunity to cross examine. *Crawford v. Washington*, 541 *U.S.* 36 (2004). This decision overrules *Ohio v. Roberts*, 448 *U.S.* 56 (1980). *Id.*

The "confrontation" requirement of *Crawford v. Washington* does not apply where the *reliability* of testimonial evidence is not at issue, and a defendant's confrontation rights may be satisfied even though the declarant does not testify. *United States v. Trala*, 386 *F.*3d 536 (3d Cir. 2004). Here the jury would not mistakenly assume the truth of declarant's statements because they were admitted as being obviously false and to establish that declarant was lying, and defendant could cross-examine the police officer to whom the statements were given. *Id.*

Trial judge erred in excluding evidence under *N.J.S.A.* 2C:14-7 regarding the sexual assault victim's past flirtations with defendant occurring between 1½ and 6 years prior to the assault. *State v. Garron*, 177 *N.J.* 147 (2003), *cert. denied*, 124 *S.Ct.* 1169 (2004). The rape shield statute keeps from the jury evidence that is constitutionally compelled to be admitted; evidence relevant to the defense that has probative value outweighing its prejudicial effect must be placed before the factfinder. *Id.*

VIII. EXPERT WITNESS (*See also* SCIENTIFIC AND TECHNICAL EVIDENCE)

A. Generally

Expert witness could not testify that defendant's slip-and-fall was not staged. *State v. Tarlowe*, 370 *N.J.Super.* 224 (App. Div. 2004).

Expert witness cannot offer a net opinion. *State v. Pavlik*, 363 *N.J.Super.* 307 (App. Div. 2003).

Police officer's unchallenged expert testimony about drug distribution did not invade the jury's fact-finding role. *State v. Summers*, 350 *N.J.Super.* 353 (App. Div. 2002), *aff'd*, 176 *N.J.* 306 (2003). An expert can testify, in the context of a hypothetical question, that an individual possessed drugs for distribution. *State v. Summers*, 176 *N.J.* 279 (2003).

Trial court correctly allowed an State's accident reconstruction expert to testify as to the "speed loss" of defendant's vehicle in an assault by auto case. *State v. Pigueiras*, 344 *N.J.Super.* 297 (App. Div. 2001), *certif. denied*, 171 *N.J.* 337 (2002).

See State v. L.P., 338 *N.J.Super.* 227 (App. Div.) (CSAAS), *certif. denied*, 170 *N.J.* 205 (2001).

B. Expert Testimony Based on Hearsay

Rebuttal testimony of the State's psychiatrist was admissible. *State v. Burris*, 357 *N.J.Super.* 326 (App. Div. 2002), *certif. denied,* 176 *N.J.* 279 (2003).

State's expert improperly offered inadmissible hearsay and opinions as to defendant's credibility and moral character. *State v. Vandeweaghe*, 351 *N.J.Super.* 467 (App. Div. 2002), *aff'd,* 177 *N.J.* 229 (2003).

Expert can rely on hearsay as to prior crimes, if of a type that experts in the relevant field rely on in reaching a conclusion. *State v. Eatman,* 340 *N.J.Super.* 295 (App. Div.), *certif. denied*, 170 *N.J.* 85 (2001).

C. Qualification of Expert Witness

Insufficient evidence of general acceptance in the relevant scientific community existed of defense expert witness' proffered testimony about the credibility of defendant's confessions. *State v. Free*, 351 *N.J.Super.* 203 (App. Div. 2002). Thus the witness' opinions were not scientifically reliable, and the subject matter involved -- the credibility of confessions -- was not beyond the average juror's grasp. *Id.*

IX. FRESH COMPLAINT

Child victim's foster mother and another foster child could relate unprompted fresh complaint evidence that defendant had sexually assaulted her. *State v. L.P.*, 352 *N.J.Super.* 369 (App. Div.), *certif. denied*, 174 *N.J.* 546 (2002). Such evidence is especially appropriate where the State relies on CSAAS testimony. *Id.*

See State v. Pillar, 359 *N.J.Super.* 249 (App. Div.), *certif. denied,* 177 *N.J.* 572 (2003).

XI. HEARSAY

A. Generally

The guilty pleas of non-testifying accomplices are inadmissible hearsay, and cannot be offered to attack their credibility. *State v. Rucki*, 367 *N.J.Super.* 200 (App. Div. 2004).

Hearsay rules do not apply to undisputed facts agreed to by the parties and presented to the grand jury. *State v. Neal*, 361 *N.J.Super.* 522 (App. Div. 2003).

Prosecutor erred in eliciting unobjected-to testimony from a police officer revealing specific information that officer had received linking defendant as the perpetrator. *State v. Taylor*, 350 *N.J.Super.* 20 (App. Div.), *certif. denied*, 174 *N.J.* 190 (2002). Repeating what a non-testifying individual told the police denied defendant his right of confrontation. *Id.*; *see State v. Vandeweaghe*, 351 *N.J.Super.* 467 (App. Div. 2002) (police officer may testify that he or she went to a scene "based on information received"), *aff'd, 177 N.J.* 229 (2003).

See State v. Frisby, 175 *N.J.* 583 (2002) (officers repeated hearsay of non-testifying witnesses and inferred guilt of defendant); *State v. Burris*, 357 *N.J.Super.* 326 (App. Div. 2002) (certain hearsay properly admitted under various evidence rules, and accompanied by correct limiting instructions), *certif. denied,* 176 *N.J.* 279 (2003).

B. Adoptive Admissions (*See also* SELF-INCRIMINATION)

Confidential informant's pre-charge statements were not adoptive admissions. *State v. Brown*, 170 *N.J.* 138 (2001) (overruling *State v. Dreher*, 302 *N.J.Super.* 408 (App. Div.), *certif. denied*, 152 *N.J.* 10 (1997), *cert. denied*, 524 *U.S.* 943 (1998)).

C. Business and Official Records

See State v. Cleverley, 348 *N.J.Super.* 455 (App. Div. 2002) (Breath Test Inspectors' Inspection Certification admissible as a business record (*N.J.R.E.* 803(c)(6)) or record of a public official (*N.J.R.E.* 803(c) (8)) when properly authenticated).

D. Declarations Against Interest

Confidential informant's pre-charge statements were not against informant's interest, and did not meet *N.J.R.E.* 803(c)(25). *State v. Brown*, 170 *N.J.* 138 (2001).

2. Co-Conspirator Statements
See State v. James, 346 *N.J.Super.* 441 (App. Div.), *certif. denied*, 174 *N.J.* 193 (2002); *State v. Baluch*, 341 *N.J.Super.* 141 (App. Div.), *certif. denied*, 170 *N.J.* 89 (2001); *State v. Soto,* 340 *N.J.Super.* 47 (App. Div.), *certif. denied*, 170 *N.J.* 209 (2001).

4. Confession of Another
A deceased's statement to a witness that "I shot some kid" was on its face inculpatory, and automatically qualified as a statement against interest under *N.J.R.E.* 803(c)(25) at defendant's trial for murdering a child. *State v. Williams*, 169 *N.J.* 349 (2001). The statement's reliability affected only its weight, not its admissibility, and excluding it was not harmless error. *Id.*

E. Excited Utterances
Child's oral statements given at the police station a few hours after defendant molested her were excited utterances, but her subsequent written statement given at police request was not so admissible because the record did not reveal if *N.J.R.E.* 803(c)(2) was satisfied. *State v. Conigliaro*, 356 *N.J.Super*. 54 (App. Div. 2002). The error in admitting the written statement was not harmless, despite the proper admission of the nearly identical oral statement. *Id.*
Statements made by defendant to her murder victim regarding uncharged acts of misconduct relating to defendant's mother's death, which the victim related to her own mother, are *res gestae* and excited utterances to prove motive. *State v. Long*, 173 *N.J.* 138 (2002).
Statements of criminal accomplices inculpating defendants "are . . . so inherently suspect that they should not be admitted in a criminal trial." *State v. Rivera*, 351 *N.J.Super.* 93 (App. Div.), *aff'd o.b.* 175 *N.J.* 612 (2003). Codefendant's statements inculpating himself and defendant in drug crimes were not admissible as excited utterances because their relationship (that the drugs were defendant's and not his) to the startling event (codefendant's arrest for discarding the drugs) was questionable. *Id.*
Excited utterances by a witness to a stabbing were admissible under *N.J.R.E.* 803(c)(2), but prosecutor erred in refusing to provide witness' address and telephone number to the defense. This deprived defendant of an opportunity to investigate. *State v. Clark*, 347 *N.J.Super.* 497 (App. Div. 2002).

G. Informant Hearsay
See State v. Vandeweaghe, 177 *N.J.* 229 (2003).

J. Prior Consistent Statements (*See also* BIAS, CREDIBILITY)
N.J.R.E. 803(a) contains no temporal requirement, and its purpose is best served by allowing trial judges to evaluate relevance under all of the circumstances in which the prior statement is offered. *State v. Muhammad*, 359 *N.J.Super*. 361 (App. Div.), *certif. denied*, 178 *N.J.* 36 (2003). Whether the statement was made before or after an asserted motive to fabricate existed is a substantial, but not a controlling, factor in determining relevance. *Id.*
See State v. Baluch, 341 *N.J.Super.* 141 (App. Div.), *certif. denied*, 170 *N.J.* 89 (2001).

M. State of Mind (*See also* RES GESTAE)
Portions of murder victim's diary and letter were not admissible pursuant to *N.J.R.E.* 803(c)(3) because her state of mind was not relevant. *State v. Chavies*, 345 *N.J.Super.* 254 (App. Div. 2001).
See State v. Long, 173 *N.J.* 138 (2002).

N. Tender Years
See State v. T.E., 342 *N.J.Super.* 14 (App. Div.), *certif. denied*, 170 *N.J.* 86 (2001).

O. Dying Declaration
See State v. Taylor, 350 *N.J.Super.* 20 (App. Div.) (trial court erred in admitting a dying declaration (*N.J.R.E.* 804(b)(2)) on a surveillance videotape showing murder victim's last few minutes of life), *certif. denied*, 174 *N.J.* 190 (2002).

P. Statement Offered Against a Party
Defendant's spontaneous statements, made after arrest and waiver of *Miranda* rights, were inadmissible because they were not relevant to proving or disproving a fact of consequence, and his cognitive deficit pointed to a certain lack of reliability. *State v. Beckler*, 366 *N.J. Super.* 16 (App. Div.), *certif. denied, 180 N.J.* 151 (2004).

Defendant's guilty pleas are evidential in civil proceedings pursuant to *R.* 3:9-2 as statements against interest under *N.J.R.E.* 803(b)(1). *State v. Tsilimidos*, 364 *N.J.Super.* 454 (App. Div. 2003). Defendant must show good cause why the plea should not be evidential. *Id.*

XII. IMPEACHMENT (*See also* PRIOR CONVICTIONS)

Defendant entitled to review school records of child sexual assault victim to impeach the credibility of the victim's mother, who testified that her son's behavior changed after defendant became involved with him. *State v. VanDyke*, 361 *N.J.Super.* 403 (App. Div.), *certif. denied*, 178 *N.J.* 35 (2003).

XIV. JUDICIAL NOTICE (*See also* SCIENTIFIC AND TECHNICAL EVIDENCE)

See State v. Simbara, 175 *N.J.* 37 (2002).

XV. PRIVILEGES

C. Marital Privilege

Defendant and her husband had waived the spousal privilege against his testifying at her trial (*N.J.R.E.* 501(2)) because he had strategically waived it at his prior trial. To allow otherwise would permit a procedural rule to shield against the finding of truth at a criminal trial. *State v. Baluch*, 341 *N.J.Super.* 141 (App. Div.), *certif. denied*, 170 *N.J.* 89 (2001).

XVII. PHOTOGRAPHIC EVIDENCE

Trial court properly admitted nude photographs of defendant to corroborate child's descriptions of his body based on her observations during his sexual assaults upon her. *State v. L.P.*, 352 *N.J.Super.* 369 (App. Div.), *certif. denied,* 174 *N.J.* 546 (2002).

XXII. OTHER CRIMES - *N.J.R.E.* 404(b)

A. Other Crimes - Generally

Robbery that defendant committed immediately upon receiving a gun was relevant to establish that he obtained it for the purpose of committing armed robberies. *State v. Muhammad*, 359 *N.J.Super.* 361 (App. Div.), *certif. denied*, 178 *N.J.* 36 (2003).

No *per se* ban exists on admitting uncorroborated other-crimes testimony of a cooperating codefendant if it meets the *Cofield* test. *State v. Hernandez*, 170 *N.J.* 106 (2001).

See State v. Beckler, 366 *N.J.Super.* 16 (App. Div.) (defendant's statements about sex acts with boys inadmissible because they lacked relevancy to case), *certif. denied*, 180 *N.J.* 151 (2004); *State v. Jenkins,* 356 *N.J.Super.* 413 (App. Div.) (trial court properly admitted other-crimes evidence that murder victim had testified against defendant at a prior murder trial because it proved an element of the witness retaliation charge and established motive; cumulative effect of the multitude of other-crimes evidence admitted and the lack of clear and complete limiting instructions deprived defendant of a fair trial), *aff'd,* 178 *N.J.* 347 (2004); *State v. T.C.,* 347 *N.J.Super.* 219 (App. Div. 2002) (trial court correctly admitted evidence of defendant's withholding of food from her son for time period outside time frame of endangering charge), *certif. denied*, 177 *N.J.* 222 (2003).

D. Other Crimes - Motive

Jury could not view victim's videotaped testimony against defendant at a prior murder trial because it, together with additional other-crimes evidence, created too great a risk that jurors would attribute to him a propensity to kill. *State v. Jenkins*, 178 *N.J.* 347 (2004).

I. Other Crimes - Identity

See State v. Fortin, 178 *N.J.* 540 (2004); *State v. Jenkins*, 349 *N.J.Super.* 464 (App. Div.), *certif. denied*, 174 *N.J.* 43 (2002).

J. Subsequent Crimes - Generally

See State v. Cofield, 127 *N.J.* 329 (1992).

Evidence of defendant's robbery was inadmissible to bolster a critical prosecution witness' credibility at defendant's trial for a prior robbery because it was irrelevant and too prejudicial. *State v. Darby*, 174 *N.J.* 509 (2002).

XXIII. PRIOR INCONSISTENT STATEMENTS

Such statements were admissible even though the hearing occurred after they were admitted. *State v. Soto*, 340 *N.J.Super.* 47 (App. Div.), *certif. denied*, 170 *N.J.* 209 (2001); *see State v. Baluch,* 341 *N.J.Super.* 141 (App. Div.), *certif. denied*, 170 *N.J.* 89 (2001).

XXVI. RELEVANCE

Photographs of defendant's nude body were relevant to corroborate the child sexual assault victim's descriptions of his body. *State v. L.P.*, 352 *N.J.Super.* 369 (App. Div.), *certif. denied*, 174 *N.J.* 546 (2002).

Fact that defendant was driving while on the revoked list, absent any indication of the reasons for that revocation, was not probative of recklessness in an aggravated manslaughter prosecution where defendant drove drunk and killed his passenger in an accident. *State v. Bakka*, 176 *N.J.* 533 (2003). But evidence of defendant's revocation was not clearly capable of producing an unjust result. *Id.*

A DYFS worker's conclusion -- that children's claims that their father had sexually abused them were unsubstantiated -- was relevant and admissible because it provided the jury with a "credibility-impeaching inference." *State v. E.B.*, 348 *N.J.Super.* 336 (App. Div.), *certif. denied*, 174 *N.J.* 192 (2002). Also, here the jury heard the victims' stories five times and defendant's denial but once. *Id.*

XXVIII. RES GESTAE

See State v. Long, 173 *N.J.* 138 (2002); *State v. Muhummad*, 359 *N.J.Super.* 361 (App. Div.) (prior robbery committed with the gun was part of the *res gestae* of the indictment's conspiracy to commit armed robbery count), *certif. denied*, 178 *N.J.* 36 (2003).

Defendant's earlier, uncharged sexual assaults upon his niece were part of the *res gestae. State v. L.P.,* 338 *N.J.Super.* 227 (App. Div.), *certif. denied*, 170 *N.J.* 205 (2001).

XXIX. SCIENTIFIC AND TECHNICAL EVIDENCE (*See also* EXPERT WITNESS, JUDICIAL NOTICE)

Proposed expert witness testimony as to the credibility of defendant's confessions was not scientifically reliable because insufficient evidence of general acceptance in the relevant scientific community existed. *State v. Free*, 351 *N.J.Super.* 203 (App. Div. 2002).

See In re Commitment of W.Z, 173 *N.J.* 109 (2002); *In re Commitment of R.S.,* 173 *N.J.* 134 (2002).

See State v. Simbara, 175 *N.J.* 37 (2002) (State Police lab certificate conformed to *N.J.S.A.* 2C:35-19, but defendant can confront its preparer at trial); *State v. DeFrank*, 362 *N.J.Super.* 1 (App. Div. 2003) (pursuant to *N.J.S.A.* 2A:62A-11, State could move into evidence the certification a nurse signed attesting that he had obtained defendant's blood sample at police request, even though that signature was not notarized); *State v. Deloatch,* 354 *N.J.Super.* 76 (Law Div. 2002) (STR method of DNA testing was sufficiently reliable and generally accepted in the scientific community).

EX POST FACTO

V. APPLYING THE PROHIBITION (GENERAL PRINCIPLES)

B. Application Limited to Penal (Criminal) Statutes

Not applicable to civil sexually violent predator act. *Smith v. Doe*, 538 *U.S.* 84 (2003); *Seling v. Young,* 531 *U.S.* 250 (2001).

See A.A. v. State of New Jersey, 176 *F.Supp.*2d 274 (D.N.J. 2001) (Internet Registry for Megan's Law registrants does not constitute *ex post facto* law), *aff'd,* 341 *F.*3d 206 (3d Cir. 2003).

VI. MISCELLANEOUS APPLICATIONS

G. Capital Punishment

See State v. Fortin, 178 *N.J.* 540 (2004) (defendant could waive *ex post facto* claim).

H. Megan's Law

Internet Registry does not violate *ex post facto* restriction. *A.A. v. State of New Jersey*, 176 *F.Supp.*2d 274 (D.N.J. 2001), *aff'd,* 341 *F.*3d 206 (3d Cir. 2003).

EXPUNGEMENT

IV. OBJECTIONS TO EXPUNGEMENT

B. Types Of Objections

2. Criminal Convictions

See State v. King, 340 *N.J.Super.* 390 (App. Div. 2001); *State v. P.L.*, 369 *N.J.Super.* 291 (App. Div. 2004) (proper expungement of defendant's third degree possession of marijuana with intent to distribute conviction; *N.J.S.A.* 2C:52-2c did not apply); *In re Petition for Expungement of Records of D.A.C.,* 337 *N.J.Super.* 493 (App. Div. 2001)

(no expungement of CDS distribution conviction even for accomplice; overruling *In re R.C.,* 292 *N.J.Super.* 151 (Law Div. 1996)).

EXTRADITION

I. NATURE & SOURCE OF PROCEEDINGS (*See also* **INTERSTATE AGREEMENT ON DETAINERS**)

Defendant validly confessed after he voluntarily agreed to an informal waiver of extradition from Pennsylvania under the Uniform Criminal Extradition Act. *State v. Soto,* 340 *N.J.Super.* 47 (App. Div.), *certif. denied*, 170 *N.J.* 209 (2001). Any possible error in so waiving was harmless. *Id.*

FIRST AMENDMENT

II. FREEDOM OF SPEECH

A. Source

See Johnson v. Yurick, 156 *F.Supp.*2d 427 (D.N.J. 2001), *aff'd*, 39 *Fed.Appx.* 742 (3d Cir. 2002).

VI. MISCELLANEOUS APPLICATIONS OF FIRST AMENDMENT LAW

Inmates have no First Amendment right to provide legal assistance to fellow inmates. *Shaw v. Murphy,* 532 *U.S.* 223 (2001).

See Johnson v. Yurick, 156 *F.Supp.*2d 427 (D.N.J. 2001) (first assistant prosecutor's discussions with criminal assignment judge behind prosecutor's back not afforded First Amendment or state constitutional free speech protection), *aff'd*, 39 *Fed.Appx.* 742 (3d Cir. 2002).

FORFEITURE (See also **REMOVAL**)

I. IN GENERAL

See State v. One 1990 Ford Thunderbird, 371 *N.J.Super.* 228 (App. Div. 2004) (*N.J.S.A.* 2C:64-1 to -9 are constitutional).

III. FORFEITURE PROCEDURE FOR DERIVATIVE CONTRABAND

B. Forfeiture Procedures

1. Civil Proceedings

Partial forfeiture proper where defendant grew marijuana in only a part of his home and where total forfeiture would be excessive. *State v. One House*, 346 *N.J.Super.* 247 (App. Div. 2001).

A hearing was needed to determine if car and money were derivative contraband under *N.J.S.A.* 2C:64-1a. *State v. One 1994 Ford Thunderbird*, 349 *N.J.Super.* 352 (App. Div. 2002).

FORGERY (*See also* **CREDIT CARDS, THEFT**)

III. INSTRUMENTS SUBJECT TO FORGERY

C. Sound and Audiovisual Recordings

N.J.S.A. 2C:21-21c(4) sufficiently defined "manufacturer" in New Jersey Anti-Piracy Act to avoid due process problem. *State v. El Moghrabi*, 341 *N.J.Super.* 354 (App. Div.), *certif. denied*, 169 *N.J.* 610 (2001).

FOURTEENTH AMENDMENT

I. DUE PROCESS

B. Capital Cases

See Shafer v. South Carolina, 532 *U.S.* 36 (2001).

E. Evidence

See Illinois v. Fisher, 540 *U.S.* 544 (2004) (defendant must prove bad faith in prosecution's failure to preserve potentially useful evidence).

H. Sentencing and Parole

The minimum penalty for a crime may be increased based on a factual finding (here, carrying a gun) found by a judge and not a jury. *Harris v. United States*, 536 *U.S.* 545 (2002).

I. Void for Vagueness and Overbreadth

See In re Commitment of W.Z., 173 *N.J.* 109 (2002) (Sexually Violent Predator Act's involuntary civil commitment provisions do not violate substantive due process); *State v. Tarlowe*, 370 *N.J.Super.* 224 (App. Div. 2004) (Health Care Claims Fraud Act was not unconstitutionally vague); *State v. Simpson*, 365 *N.J.Super.* 444 (App. Div. 2003) (bail forfeiture rules, *R.* 1:13-3(d) and (e) and *R.* 3:26-6, did not violate procedural due process); *State v. Bond*, 365 *N.J.Super.* 430 (App. Div. 2003) (community supervision for life statute,

N.J.S.A. 2C:43-6.4, not vague or overbroad); *State v. Stafford*, 365 *N.J.Super.* 6 (App. Div. 2003) (township ordinances prohibiting the feeding of migratory wildfowl on private property were not vague); *State v. Jones*, 346 *N.J.Super.* 391 (App. Div.) (interference with custody statute not overbroad) *certif. denied*, 172 *N.J.* 181 (2002).

N.J.S.A. 39:4-50(g) was vague in defining a "second offender" in a school zone for sentencing purposes. *State v. Reiner*, 180 *N.J.* 307 (2004).

Municipal ordinance prohibiting obstruction of public sidewalks was unconstitutionally vague, and had to be strictly construed because it essentially was criminal in nature. *State v. Golin*, 363 *N.J.Super.* 474 (App. Div. 2003).

Use of the term "substantially identical" in the assault firearms statute, *N.J.S.A.* 2C:39-1w, is not unduly vague. *State v. Petrucci*, 343 *N.J.Super.* 536 (App. Div. 2001), *certif. granted & remanded,* 176 *N.J.* 277 (2003).

J. Miscellaneous

State supreme court's retroactive application of "year and a day" rule's abolition did not deny due process. *Rogers v. Tennessee*, 532 *U.S.* 451 (2001).

See H.E.S. v. J.C.S., 175 *N.J.* 309 (2003) (lack of sufficient time to defend against imposition of FRO violates due process, as does refusal to grant an adjournment).

Right to be present during trial includes right to notice of adjourned trial date. *State v. Smith*, 346 *N.J.Super.* 233 (App. Div. 2002).

II. EQUAL PROTECTION

A. General

N.J.S.A. 2C:35-7.1 is neutral on its face, and neither its purpose nor effect is discriminatory. *State v. Brooks,* 366 *N.J.Super.* 447 (App. Div. 2004).

N.J.S.A. 40:69A-166 did not violate equal protection because disqualification from public office for those convicted of crimes involving moral turpitude was reasonably tailored to further legitimate governmental interests. *McCann v. Clerk of the City of Jersey City*, 167 *N.J.* 311 (2001).

See State v. Petrucci, 343 *N.J.Super.* 536 (App. Div. 2001), *certif. granted & remanded,* 176 *N.J.* 277 (2003).

B. Jury Selection

1. Use of Peremptory Challenges

See State v. Chevalier, 340 *N.J.Super.* 339 (App. Div.), *certif. denied*, 170 *N.J.* 386 (2001).

C. Selective Enforcement

See State v. Francis, 341 *N.J.Super.* 67 (App. Div. 2001).

FRAUD

VIII. HEALTH CARE CLAIMS FRAUD

A. Definitions

N.J.S.A. 2C:21-4.3c applied to defendant even though the inquiries sustained in his staged slip-and-fall were allegedly legitimate. *State v. Tarlowe*, 370 *N.J.Super.* 224 (App. Div. 2004).

D. Culpability

See State v. Tarlowe, 370 *N.J.Super.* 224 (App. Div. 2004).

GRAND JURY *(See also* **INDICTMENT**)

II. CHALLENGES TO THE ARRAY AND TO INDIVIDUAL JURORS *(See also* **JURIES**)

Grand jurors need not be *voir dired* regarding their views on the death penalty, and need not be "death qualified." *State v. Toliver*, 180 *N.J.* 164 (2004). The grand jurors' role is accusatory, not adjudicatory. *Id.*

III. SECRECY AND DISCOVERY (*See also* **DISCOVERY** and RELEASE OF GRAND JURY MATERIALS in the Prosecutor's Grand Jury Manual)

Plaintiff's complaint seeking police investigative reports under the Right-to-Know law dismissed on summary judgment because confidentiality of grand jury presentments outweighed the public's common law right to know about the investigation's details. *Daily Journal v. Police Dep't of Vineland*, 351 *N.J.Super.* 110 (App. Div.), *certif. denied*, 174 *N.J.* 364 (2002). Criminal

investigative reports, while separate from grand jury investigations, are not public records under *N.J.S.A.* 47:1A-1 to 4. *Id.*

V. INDICTMENT (*See also* **INDICTMENT**)

B. Challenging the Adequacy of Proofs

See State v. Neal, 361 *N.J.Super.* 522 (App. Div. 2003) (hearsay rules not applicable to undisputed facts).

VI. PRESENTMENTS

Citizens are entitled to directly communicate to a county grand jury and request to testify about a matter within its jurisdiction. *In re Grand Jury Appearance Request by Loigman*, 370 *N.J.Super.* 406 (App. Div. 2004).

GUILTY PLEAS AND PLEA BARGAINING

I. PREREQUISITE TO ENTRY OF GUILTY PLEA

A. Factual Basis

A sufficient factual basis existed to support the juvenile's guilty plea to unlawful possession of a weapon -- he fired a paintball gun at another's car. *State in re G.C.*, 179 *N.J.* 475 (2004).

Trial court's rejection of guilty plea to aggravated manslaughter was based on an insufficient factual underpinning and legal mistakes. *State v. Madan*, 366 *N.J.Super.* 98 (App. Div. 2004).

Adequate factual basis existed for juvenile's guilty plea to unlawful possession of a weapon adjudication because a paint ball gun satisfies *N.J.S.A.* 2C:39-1f. *State in re G.C.*, 179 *N.J.* 475 (2004). Juvenile shot a paintball gun at a car, which posed a threat of damage to property pursuant to *N.J.S.A.* 2C:39-5d. *Id.*

Guilty plea to robbery while armed with an unloaded but operable gun constitutes a NERA crime. *State v. Jules*, 345 *N.J.Super.* 185 (App. Div. 2001), *certif. denied*, 171 *N.J.* 337 (2002).

See In re Civil Commitment of J.D., 348 *N.J.Super.* 347 (App. Div. 2002) (juvenile's plea attempt failed to address crime's elements).

See State v. Shoats, 339 *N.J.Super.* 359 (App. Div. 2001) (lack of a factual basis for a "violent crime"); *State v. Hernandez*, 338 *N.J.Super.* 317 (App. Div. 2001).

B. Voluntariness and Understanding the Consequences of the Plea

See Iowa v. Tovar, 541 *U.S.* 77 (2004) (uncounselled defendant pleading guilty must knowingly and intelligently waive the right to counsel, but need not be informed of possible defenses to the criminal charges or that waiving the right in pleading guilty risks overlooking a viable defense); *State v. Bellamy*, 178 *N.J.* 127 (2003) (as a matter of fundamental fairness, trial courts are to advise defendants pleading guilty to sexually violent offenses of the possibility of the collateral consequence of civil commitment under the Sexually Violent Predator Act); *State v. Bond*, 365 *N.J.Super.* 430 (App. Div. 2003) (community supervision for life statute gave adequate notice that use of drugs is prohibited, and defendant received written notice of all conditions of such supervision); *State v. Jamgochian,* 363 *N.J.Super.* 220 (App. Div. 2003) (community supervision for life was a penal, not collateral, consequence of a guilty plea that defendant needs to understand); *State v. Wood*, 361 *N.J.Super.* 427 (App. Div. 2003) (NERA's applicability pursuant to "deadly weapon" definition); *State v. Freudenberger*, 358 *N.J.Super.* 162 (App. Div. 2003) (parole supervision period following NERA period of parole ineligibility).

Juvenile could not validly plead guilty to a sexual assault when unrepresented by counsel. *In re Civil Commitment of J.D.*, 348 *N.J.Super.* 347 (App. Div. 2002).

II. PLEA BARGAINS GENERALLY

The filing of an arrest warrant is one method of "commencing" violation of probation proceedings pursuant to *N.J.S.A.* 2C:45-3c. *State v. Nelson*, 178 *N.J.* 192 (2003).

The county prosecutor had no power to bargain away the Attorney General's authority to seek civil commitment under the Sexually Violent Predator Act (*N.J.S.A.* 30:4-27.24 *et seq.*). *In re Commitment of P.C.*, 349 *N.J.Super.* 569 (App. Div. 2002). The prosecutor's entry into a plea agreement containing a stipulation that the Act did not apply intruded upon the Attorney General's authority to protect the public from sexually violent predators. *Id.*

Defense counsel may not waive right to seek less than a particular sentence, and have an unfettered right to argue in favor of a lesser term at sentencing. *State v. Briggs*, 349 *N.J.Super.* 496 (App. Div. 2002).

See State v. Malik, 365 *N.J.Super.* 267 (App. Div. 2003) (as to Medicaid fraud and misconduct by a corporate official), *certif. denied*, 180 *N.J.* 354 (2004).

III. PLEA BARGAINING UNDER THE CODE

See State v. Rolex, 167 *N.J.* 447 (2001); *State v. Hammer*, 346 *N.J.Super.* 359 (App. Div. 2001).

IV. WITHDRAWAL OF GUILTY PLEAS

Parties could not negotiate an illegal sentence (here, five years with three and a half years of parole ineligibility), even under *N.J.S.A.* 2C:35-12. *State v. Smith*, ___ *N.J.Super.* ___ (App. Div. 2004).

Defendant seeking post-conviction relief could move to withdraw his guilty pleas and go to trial because his mother slept with his attorney before sentencing. *State v. Lasane*, 371 *N.J.Super.* 151 (App. Div. 2004).

The trial court did not abuse its discretion in denying defendant's pre-sentencing motion to withdraw his guilty plea to sexual assault. Defendant had asserted that he had an alibi that prior counsel did not present due to pressure supposedly brought to bear to take the plea. *State v. Luckey*, 366 *N.J.Super.* 79 (App. Div. 2004). Defendant was, however, entitled to a remand to reconsider his withdrawal application because the plea form did not define community supervision for life as a plea consequence and to permit him to argue the consequences of potential commitment under the Sexually Violent Predator Act. *Id.*

The Appellate Division chose to consider defendant's attacks on all of his statements -- including his oral statements made at the scene and his taped statements given at headquarters -- because in pleading guilty to capital murder he was generally informed that he could appeal his "statements." *State v. Diloreto,* 362 *N.J.Super.* 600 (App. Div. 2003), *aff'd o.g.* 180 *N.J.* 264 (2004).

While defendant had not moved in the trial court to vacate her guilty plea to aggravated manslaughter based on her claim that she had not been advised of the parole supervision period following release on a NERA term, on remand defendant may move to withdraw her guilty pleas and attempt to prove that she had not been advised of this "significant penal consequence." *State v. Freudenberger*, 358 *N.J.Super.* 162 (App. Div. 2003).

Defendant who pleaded guilty to violating his probation waives any statute of limitations defense. *State v. Nellom*, 354 *N.J.Super.* 485 (App. Div. 2002), *aff'd*, 178 *N.J.* 192 (2003).

Appellate court reached issue concerning admissibility of defendant's statement despite defendant's failure to preserve the issue as part of the guilty plea pursuant to *R.* 3:9-3(f). *State v. Brown*, 352 *N.J.Super.* 338 (App. Div.), *certif. denied*, 174 *N.J.* 544 (2002).

Defendants cannot seek to vacate only the NERA parole ineligibility term and not the plea agreement itself. *State v. Reardon*, 337 *N.J.Super.* 324 (App. Div. 2001).

Defendant could not successfully claim that he had not understood the Megan's Law consequences of community supervision for life when he pleaded guilty to endangering a child's welfare via sexual conduct because he had reviewed the guilty plea forms setting forth the registration consequences, and at sentencing and in the judgment of conviction was informed that he was subject to lifetime community supervision. *State v. Williams*, 342 *N.J.Super.* 83 (App. Div.), *certif. denied*, 170 *N.J.* 87 (2001). Defendant also never asserted his innocence and was never misinformed of the Megan's Law consequences of pleading guilty. *Id.*

In seeking to withdraw a guilty plea based on the State's failure to disclose exculpatory evidence, the applicable inquiry focuses on the withheld evidence's persuasiveness and the impact it would have had on defendant's decision to plead guilty. *State v. Parsons*, 341 *N.J.Super.* 448 (App. Div. 2001). Parsons was entitled to retract his plea because the evidence not revealed included investigation of an arresting officer for potentially having violated discovery rules at defendant's arrest.

See State v. Bellamy, 178 *N.J.* 127 (2003) (failure to advise defendant pleading guilty to sexually violent offense of the possibility of civil commitment pursuant to the Sexually Violent Predator Act -- a collateral plea consequence -- meant he could move to withdraw his plea); *State v. Och*, 371 *N.J.Super.* 274 (App. Div. 2004).

GUN PERMITS

II. PURCHASE OF FIREARMS - *N.J.S.A.* 2C:58-3

B. Firearms Purchaser Identification Card

In evaluating the denial of a duplicate firearms purchaser identification card, trial judges must give appropriate weight to the interest of the community in which the applicant resides at the time the application is filed. *In re Application of Boyadjian*, 362 *N.J.Super.* 463 (App. Div.), *certif. denied*, 178 *N.J.* 250 (2003). And judges reviewing such applications must appropriately consider the local interest factor to the extent reflected in a police chief's denial. *Id.*

E. How to Obtain a Permit to Purchase a Handgun and Firearms Purchaser Identification Card

See In re Application of Boyadjian, 362 *N.J.Super.* 463 (App. Div.), *certif. denied*, 178 *N.J.* 250 (2003).

III. PERMITS TO CARRY HANDGUNS - *N.J.S.A.* 2C:58-4

C. Who May Obtain

Bounty hunters are not recognized by state statute and have no legal responsibility to act without police assistance, and as a class could not obtain carry permits. *In re Application of Borinsky*, 363 *N.J.Super.* 10 (App. Div. 2003). None of the applicants had made a sufficiently particularized showing of justifiable need to carry handguns in pursuit of their voluntarily undertaken, private activities. *Id.*

HABEAS CORPUS

II. IMPLEMENTING STATUTES AND RULES

For purposes of applying *Lindh v. Murphy*, 521 *U.S.* 320 (1997), a case is not "pending" in federal court until an actual habeas corpus application is filed with it. *Woodford v. Garceau*, 538 *U.S.* 202 (2003).

To be granted, a certificate of appealability does not require a showing that an appeal will succeed -- the only issue is whether the district court's decision was debatable among jurists of reason. *Miller-El v. Cockrell*, 534 *U.S.* 1122 (2003).

III. NATURE OF THE WRIT

See Middleton v. McNeil, 124 *S.Ct.* 1830 (2004) (court of appeals failed to give appropriate deference to the state court, which determined that jury instructions were not reasonably likely to mislead the jury); *Price v. Vincent*, 538 *U.S.* 634 (2003) (reiterating requirements of 28 *U.S.C.* §2254(d)(1) and (2) and its decision in *Williams v. Taylor*, 529 *U.S.* 262 (2000)); *Cordova v. Baca*, 346 *F.*3d 924 (9th Cir. 2003) (structural error requiring reversal exists where the state court determined that petitioner did not waive his right to counsel at trial; no harmless error analysis ensues).

Although AEDPA requires deference to claims adjudicated on the merits in state court, this implies that the claims must be adjudicated by a court of competent jurisdiction. *Lambert v. Blackwell*, 387 *F.*3d 210 (3d Cir. 2004).

State trial court's error in forcing petitioner to proceed at trial *pro se* when he refused to accept his third appointed attorney did not contradict or unreasonably apply Supreme Court precedent. *Fischetti v. Johnson*, 384 *F.*3d 140 (3d Cir. 2004).

The state courts' application of *Strickland* was not objectively unreasonable, and petitioner failed to demonstrate a reasonable likelihood that a different result would have been reached had counsel not erred. *Affinito v. Hendricks*, 366 *F.*3d 252 (3d Cir. 2004); *see Sutton v. Blackwell*, 327 *F.Supp.*2d 477 (D.N.J. 2004).

Supreme Court of New Jersey's decision that petitioner received the effective assistance of counsel during his capital trial was both a reasonable application of federal law and a reasonable interpretation of the facts pursuant to 28 *U.S.C.* §2254(d) (1) and (2). *Martini v. Hendricks*, 188 *F.Supp.*2d 505 (D.N.J. 2002), *aff'd*, 348 *F.*3d 360 (3d Cir. 2003). So, too, were the Supreme Court's conclusions that no *Brady* violation had occurred, that alleged exclusion of potential jurors based on reservations about the death penalty did not violate due process or petitioner's right to an impartial jury, that the trial court's refusal to instruct the jury on a particular matter was not improper, that the trial court did not err in answering a jury question, and that the trial court's exclusion of certain defense evidence during the post-conviction relief hearing did not violate due process. *Id.*

See Yarborough v. Gentry, 540 *U.S.* 1 (2003); *Penry v. Johnson*, 531 *U.S.* 1003 (2001); *Johnson v. Carroll*, 369 *F.*3d 253 (3d Cir. 2004); *Marshall v. Hendricks*, 313 *F.Supp.*2d 423 (D.N.J. 2004); *Appel v. Horn*, 250 *F.*3d 203 (3d Cir. 2001).

IV. "IN CUSTODY" REQUIREMENT

A. "In Custody"

Petitioner was not "in custody" for purposes of 28 *U.S.C.* §2254 simply because, after completing his state prison sentence, he continued to make restitution payments. *Obado v. New Jersey*, 328 *F.*3d 716 (3d Cir. 2003).

State's sexually violent predator act was civil, not criminal, and could not be deemed punitive; inmate's double jeopardy and *ex post facto* challenges were precluded. *Lackawanna County District Attorney v. Coss*, 531 *U.S.* 923 (2001); *Seling v. Young*, 531 *U.S.* 250 (2001).

Petitioner who completed his state sentence but who was being confined by the INS was not in custody under 18 *U.S.C.* §2241. He therefore could not seek habeas corpus relief and could not attack the validity of his convictions. *Neyor v. Immigration & Naturalization Serv.*, 155 *F.Supp.*2d 127 (D.N.J. 2001). The State had an interest in the finality of convictions, and petitioner had failed to exhaust available state remedies and had procedurally defaulted on certain claims. *Id.*

B. Past or Future Confinement

See Lackawanna County District Attorney v. Coss, 531 *U.S.* 923 (2001).

VI. *PRO SE* PETITIONS

District courts are not required to warn *pro se* litigants, presenting mixed petitions with unexhausted claims, as to the time bar's potential effect if petitioner dismissed the petition without prejudice and returned to state court to exhaust. *Pliler v. Ford*, 124 *S.Ct.* 2441 (2004). District court judges have no obligation to counsel *pro se* litigants. *Id.*

See Pindale v. Nunn, 248 *F.Supp.*2d 361 (*D.N.J.* 2003) (State required to serve, on petitioner requesting them, the exhibits accompanying its answer).

VII. TIME LIMITATIONS

One-year statute of limitations applies on a claim-by-claim basis. *Fielder v. Varner*, 379 *F.*3d 113 (3d Cir. 2004). Thus petitioner's claim based on newly discovered evidence was timely because he filed it within one year of discovery, but his other claims were untimely. *Id.*

D. Statutory Tolling

The one-year limitations period is tolled while a "properly filed" state post-conviction relief application is "pending" in the state courts. *Carey v. Saffold*, 536 *U.S.* 214 (2002).

A federal habeas corpus petition is not an "application for State post-conviction or other collateral review" for purposes of 28 *U.S.C.* §2244(d)(2), and therefore does not toll the one year time period for filing a petition under AEDPA. *Duncan v. Walker*, 533 *U.S.* 167 (2001). Congress' omission of the word "Federal" in this context meant that it did not intend properly filed federal habeas petitions to toll the limitation period. *Id.*

E. Equitable Tolling

Attorney malfeasance alone does not warrant equitable tolling. *Schlueter v. Varner*, 384 *F.*3d 69 (3d Cir. 2004). Petitioner also must prove that he or she acted diligently and that extraordinary circumstances caused the petition to be untimely. *Id.*

Counsel's misinformation to petitioner regarding the time available to file a habeas corpus petition did not constitute grounds for equitable tolling. *Johnson v. Hendricks,* 314 *F.*3d 159 (3d Cir. 2002), *cert. denied,* 538 *U.S.* 1022 (2003). Errors in computing the one-year statute of limitations did not trigger any principle of equity rendering the limitation period unfair, no extraordinary circumstances required equitable tolling, and nothing prevented petitioner from complying with 28 *U.S.C.* §2244 (d)(1). *Id.*

VIII. EXHAUSTION OF STATE REMEDIES

See Lewis v. Pinchak, 348 *F.*3d 355 (3d Cir. 2003) (Third Circuit declined to resolve appeal on exhaustion grounds), *cert. denied*, 124 *S.Ct.* 1461 (2004).

IX. PROCEDURAL DEFAULT

Federal courts faced with allegations of actual innocence must first address all non-defaulted claims for comparable relief and other grounds for cause to excuse the procedural default. *Dretke v. Haley*, 124 *S.Ct.* 1847 (2004).

Supreme Court will not decide a question of federal law if a state court's decision rests on an independent and adequate state law ground, be it substantive or procedural. *Lee v. Kemna*, 534 *U.S.* 362 (2002). Although ordinarily violation of a firmly established state law will foreclose review of a federal claim, there exist exceptional cases where exorbitant application of a generally

sound rule renders the state ground inadequate to foreclose consideration of a federal question. *Id.*

See Hubbard v. Pinchak, 378 *F.*3d 333 (3d Cir. 2004) ("actual innocence" exception to procedurally defaulted claims applies only in the rarest of cases).

X. SUCCESSIVE PETITIONS

Federal courts cannot recharacterize a *pro se* litigant's motion to vacate the conviction as a first habeas corpus petition without warning them about future restrictions on filing successive petitions and offering them an opportunity to withdraw or amend the filing. *Castro v. United States*, 540 *U.S.* 375 (2003). Absent these warnings, a recharacterized motion will not count as a habeas corpus application for purposes of applying the "second or successive" provision. *Id.*

Although under *Cage v. Louisiana*, 498 *U.S.* 39 (1990), a jury instruction is unconstitutional if a reasonable likelihood exists that the jury understood it to permit conviction without proof beyond a reasonable doubt, the Supreme Court did not make this rule retroactive to cases on collateral review. *Tyler v. Cain*, 533 *U.S.* 656, 664-66 (2001). AEDPA also greatly restricts a federal court's power to provide relief to state prisoners filing second or successive habeas petitions. *Id.* at 661.

A motion for reconsideration of a habeas petition's denial pursuant to *F.R.C.P.* 60(b) should be considered a second or successive petition when it seeks to collaterally attack the underlying convictions. *Pridgen v. Shannon*, 380 *F.*3d 721 (3d Cir. 2004).

Also, the Supreme Court did not "dictate" that the constitutional law announced in *Apprendi v. New Jersey*, 530 *U.S.* 466 (2000), was retroactive to cases on collateral review. *In re Turner*, 267 *F.*3d 225, 227 (3d Cir. 2001). Thus Turner could not file a second habeas corpus petition raising an *Apprendi* claim.

A federal habeas corpus petitioner's first successful motion to reinstate his direct appeal did not render later petitions "successive" under AEDPA. *In re Olabode*, 325 *F.*3d 166 (3d Cir. 2003).

XII. STATE LAW CLAIMS

A state court decision is not "contrary to" clearly established federal law merely because the state court took a different view of ambiguous Supreme Court precedent than did the federal court of appeals. *Mitchell v. Esparza*, 540 *U.S.* 12 (2003). Here the state court did not apply the harmless error doctrine in an "objectively unreasonable" manner. *Id.*

Under AEDPA, petitioner's burden is to prove that the state court applied federal law in an objectively unreasonable manner. *Woodford v. Visciotti*, 537 *U.S.* 19 (2002).

State courts need not cite United States Supreme Court precedents, or even be aware of them, when making their determinations. The critical issue under 28 *U.S.C.* §2254(d) is if the state court decision contradicts or unreasonably applies such precedent. *Early v. Packer*, 537 *U.S.* 3 (2002).

Also, federal courts are not to second guess a state parole board's decision absent a finding that it shocks the judicial conscience. *Hunterson v. DiSabato*, 308 *F.*3d 236 (3d Cir. 2002).

While the Appellate Division had correctly identified federal law governing prosecutorial misconduct, its decision was an unreasonable application of that law where the prosecutor implied that the African-American defendant had raped to satisfy his sexual frustrations; that defendant preferred Caucasian women because both his wife and his victim were white, and had chosen his victim on this basis; and that the jury would visit a "worse assault" on the victim if it did not believe her testimony. *Moore v. Morton*, 255 *F.*3d 95 (3d Cir. 2001). The trial court's curative instructions were proper, but could not cure the errors. *Id.*; *see also Penry v. Johnson*, 531 *U.S.* 1003 (2001) (erroneous supplemental instruction on mitigating evidence in a capital case); *Lackawanna County District Attorney v. Coss*, 531 *U.S.* 923 (2001) (no remedy for state prisoner attacking a current sentence enhanced by an allegedly unconstitutional prior conviction for which prisoner is no longer in custody).

XIII. DISCOVERY

State is to serve a copy of the exhibits accompanying its answer on a *pro se* petitioner who requests them. *Pindale v. Nunn*, 248 *F.Supp.*2d 361 (D.N.J. 2003).

XIV. EVIDENTIARY HEARING

Although the state court had unreasonably applied *Batson v. Kentucky*, 476 *U.S.* 79 (1986), in not requiring the prosecution to identify its reasons for striking 12 of 14 African-Americans in the jury pool, the proper remedy in the district court was an evidentiary hearing

-- not the granting of a new trial -- to permit the State to "present evidence in defense of its actions." *Hardcastle v. Horn*, 368 *F.*3d 246, 259 (3d Cir. 2004).

District court to hold an evidentiary hearing on defendant's claim of ineffective assistance of counsel during the penalty phase. *Marshall v. Hendricks*, 307 *F.*3d 36 (3d Cir. 2002), *cert. denied,* 538 *U.S.* 911 (2003).

HARASSMENT (*See also* **DISORDERLY PERSONS**)

III. ELEMENTS/PURPOSE TO HARASS

Insufficient evidence existed to prove that defendant harassed his 18-year-old daughter during their argument over finances. *State v. Walsh*, 360 *N.J.Super.* 208 (App. Div. 2003).

HINDERING

No error in not requiring jury to specifically find which of two factual circumstances, or both, supported hindering conviction. *State v. Chavies*, 345 *N.J.Super.* 254 (App. Div. 2001).

HOMICIDE (*See also* **CAPITAL PUNISHMENT, COMPLICITY, DEFENSES, INSANITY, INTOXICATION, SELF-DEFENSE**)

I. MURDER - *N.J.S.A.* 2C:11-3

A. Types of Murder

Felony murder is committed even if defendant sets fire to the victim and not to a dwelling or other structure. *State v. Arenas*, 363 *N.J.Super.* 1 (App. Div. 2003), *certif. denied*, 178 *N.J.* 452 (2004). Defendant is guilty of felony murder for an intended killing committed in the course of a predicate felony. *Id.*

III. INSTRUCTIONS

A. Generally

No rational basis existed for lesser-included aggravated and reckless manslaughter charges. *State v. Hammond*, 338 *N.J.Super.* 330 (App. Div.), *certif. denied*, 169 *N.J.* 609 (2001).

IV. VEHICULAR HOMICIDE - *N.J.S.A.* 2C:11-5

Evidence of driving on the revoked list, when accompanied by the reasons for that revocation, may be probative of recklessness in a vehicular homicide conviction. *State v. Bakka*, 176 *N.J.* 533 (2003). Erroneously admitting such evidence can also be harmless. *Id.*

See State v. Pelham, 176 *N.J.* 448 (as to causation and intervening cause of death issues), *cert. denied*, 540 *U.S.* 909 (2003).

V. SENTENCES

C. Vehicular Homicide - *N.J.S.A.* 2C:11-5

Facts giving rise to mandatory parole disqualifier under *N.J.S.A.* 2C:11-5b(1) need not be proven beyond a reasonable doubt to a jury. *State v. Stanton*, 176 *N.J.* 75, *cert. denied*, 540 *U.S.* 903 (2003).

See State v. Jarrells, 181 *N.J.* 538 (2004) (like *State v. Ferencsik*, 326 *N.J.Super.* 228 (App. Div. 1999), and *State v. Wade*, 169 *N.J.* 302 (2001), pre-amendment NERA applies to vehicular homicide); *State v. Lebra*, 357 *N.J.Super.* 500 (App. Div. 2003) (probationary term for vehicular homicide is illegal).

IDENTIFICATION

II. PROCEDURES

B. Show-Ups

Although defendant was handcuffed in the back of a police vehicle when witnesses identified him, this happened shortly after the crimes occurred and it was necessary for the police to act swiftly in apprehending the perpetrator where shots were fired in a congested area and the public risk was high. *State v. Wilson*, 362 *N.J.Super.* 319 (App. Div.), *certif. denied*, 178 *N.J.* 250 (2003).

C. Photographic Identifications

Photographic array was not unduly suggestive, but even if it was it was incapable of tainting the witnesses' in-court identifications. *State v. Galiano*, 349 *N.J.Super.* 157 (App. Div. 2002), *certif. denied*, 178 *N.J.* 375 (2003).

See State v. Livingston, 340 *N.J.Super.* 133 (App. Div.), *aff'd o.g.* 172 *N.J.* 209 (2002).

IV. JURY INSTRUCTION CONCERNING IDENTIFICATION

No need for cross-racial identification charge *sua sponte. State v. Murray,* 338 *N.J.Super.* 80 (App. Div.), *certif. denied, 169 N.J.* 608 (2001).

See State v. Galiano, 349 *N.J.Super.* 157 (App. Div. 2002) (identification charge was proper), *certif. denied*, 178 *N.J.* 375 (2003).

INCOMPETENCY TO STAND TRIAL (*See also* **INSANITY, WITNESSES**)

III. DETERMINATION OF THE FITNESS TO PROCEED; EFFECT OF FINDING UNFITNESSS; PROCEEDINGS IF FITNESS IS REGAINED; POST-COMMITMENT HEARINGS (*N.J.S.A.* 2C:4-6).

A. Determination of Fitness to Proceed

In a case where the defense experts testified that defendant was incompetent to stand trial and the state expert found him competent, the Appellate Division disagreed with the trial court hearing the witnesses and determined that the State witness was not as qualified to evaluate mental retardation. *State v. M.J.K.*, 369 *N.J.Super.* 532 (App. Div.), *certif. granted*, 181 *N.J.* 549 (2004). Therefore, the appellate court held that defendant could not stand trial. *Id.*

INDICTMENT (*See also* **GRAND JURY, JOINDER AND SEVERANCE**)

II. AMENDMENT AND TECHNICAL ERROR

A. Generally

See State v. Tarlowe, 370 *N.J.Super.* 224 (App. Div. 2004).

III. DISMISSAL OF INDICTMENT (*See also* **PROSECUTORS**)

A. Generally

Although the prosecutor's refusal to proceed while seeking a stay of the trial court's decision was clearly wrong, neither fundamental fairness nor the prosecutor's actions justified dismissing the indictment. *State v. Ruffin*, 371 *N.J.Super.* 371 (App. Div. 2004). The trial court erred in denying a stay after it suppressed evidence going to the heart of the State's case. *Id.*

While a defendant has no right to appear before the grand jury unless subpoenaed or invited to testify with his or her consent, he or she cannot be compelled to so appear while handcuffed or shackled, and accompanied by sheriff's officers, unless the trial court holds a hearing and determines that law enforcement's legitimate security concerns cannot otherwise be met. *State v. Grant*, 361 *N.J.Super.* 349 (App. Div. 2003). The trial judge has the sole responsibility for determining if physical restraints are required, and here the grand jury also should not have learned that defendant had overstayed his work visa and was being held on $1,000,000 bail. *Id.*

See State v. Gruber, 362 *N.J.Super.* 519 (App. Div.) (trial court erred in dismissing indictment under *N.J.S.A.* 2C:1-3f, the statutory curtailment of the dual sovereignty doctrine), *certif. denied*, 178 *N.J.* 251 (2003).

VII. VARIANCE

See State v. Berardi, 369 *N.J.Super.* 445 (App. Div. 2004) (although jury charged as to a type of carjacking not found in the indictment, error was not clearly capable of producing an unjust result and counsel apparently approved of the charge given).

INFORMANTS

I. GOVERNMENTAL PRIVILEGE TO WITHHOLD INFORMER'S IDENTITY

See State v. Williams, 364 *N.J.Super.* 23 *(*App. Div. 2003).

INSANITY (*See also* **INCOMPETENCY TO STAND TRIAL, INTOXICATION**)

I. RAISING THE INSANITY DEFENSE

Trial courts may not appoint *amicus* counsel for the purpose of assisting them in investigating defendant's capacity to waive an insanity defense. *State v. Marut*, 361 *N.J.Super.* 431 (App. Div. 2003).

INTERSTATE AGREEMENT ON DETAINERS (IAD) (*See also* **EXTRADITION**)

II. MECHANICS OF THE AGREEMENT

A. Article III

Defendant failed to deliver all necessary and executed IAD forms, thereby failing to trigger the 180 day time period for the State to try him. *State v. Pero*, 370 *N.J.Super.* 203 (App. Div. 2004).

A defendant's request for trial disposition of an indictment is not tantamount to a detainer, and does not trigger the 180 day time period for trial pursuant to *N.J.S.A.* 2A:159A-3a. *State v. Burnett*, 351 *N.J.Super.* 222 (App. Div. 2002).

B. Article IV

The "antishuttling" provision of the IAD bars a defendant's return to the receiving state even though he or she previously had been sent there on a detainer for a one-day arraignment and was returned to the sending state. The IAD's absolute language required that every prisoner's arrival in the receiving state triggered the "no return" mandate. *Alabama v. Bozeman*, 531 *U.S.* 1051 (2001).

JOINDER & SEVERANCE

I. OFFENSES IN THE SAME INDICTMENT OR ACCUSATION

A. Permissive Joinder of Offenses

See State v. Pierro, 355 *N.J.Super.* 109 (App. Div. 2002)(*R.* 3:7-6 joinder of burglary and theft offenses committed four days apart was proper), *certif. denied,* 175 *N.J.* 434 (2003).

B. Mandatory Joinder of Offenses

Cocaine sales made minutes apart were part of the "same episode" and should have been part of the same indictment. *State v. Williams*, 172 *N.J.* 361 (2002).

C. Severance of Offenses

Child sexual assault offenses involving two victims were properly joined for trial. *State v. Krivacska*, 341 *N.J.Super.* 1 (App. Div.), *certif. denied*, 170 *N.J.* 206 (2001), *cert. denied*, 535 *U.S.* 1012 (2002).

II. DEFENDANTS

See State v. Brown, 170 *N.J.* 138 (2001).

JURIES

I. RIGHT TO JURY TRIAL

B. No Right to a Jury Trial

7. Civil Action Under New Jersey Insurance Fraud Prevention Act - *N.J.S.A.* 17:33A-1 to 30

See State v. Sailor, 355 *N.J.Super.* 315 (App. Div. 2002).

8. Vehicular Homicide

Intoxication pursuant to *N.J.S.A.* 2C:11-5b(1) is not an element of vehicular homicide, but rather is a sentencing factor triggering a one-third to one-half term of parole ineligibility that the trial court can find at sentencing by a preponderance of the evidence. *State v. Stanton,* 176 *N.J.* 75, *cert. denied*, 540 *U.S.* 903 (2003).

III. *VOIR DIRE*; EXCUSAL FOR CAUSE; PEREMPTORY CHALLENGES

A. Generally

2. Examples

Trial judge generally should not reseat jurors invalidly excused based on gender. *State v. Chevalier*, 340 *N.J.Super.* 339 (App. Div.), *certif. denied*, 170 *N.J.* 386 (2001).

See State v. Fuller, 356 *N.J.Super.* 266 (App. Div. 2002) (prosecutor excused some potential jurors based upon their religious beliefs), *certif. denied*, 176 *N.J.* 74 (2003).

B. *Voir Dire* Examination on Particular Topics

See State v. Hill, 365 *N.J.Super.* 463 (App. Div.) (defendant requested questioning regarding the use of a hammer or blunt object to commit the crimes), *certif. denied*, 179 *N.J.* 373 (2004).

IV. DISQUALIFICATION OF JUROR

Trial court should not have removed a deliberating juror who claimed that she could not imprison defendant because her situation did not satisfy *R.* 1:8-2(d)(1). *State v. Jenkins*, 365 *N.J.Super.* 18 (App. Div. 2003), *certif. granted*, 179 *N.J.* 369 (2004).

Trial court may not permit an individual to sit as a juror after the juror has alleged bias. *State v. Tyler*, 176 *N.J.* 171 (2003).

See State v. Farmer, 366 *N.J.Super.* 307 (App. Div.) (juror properly removed during deliberations when it was discovered that he had prior criminal convictions), *certif. denied*, 180 *N.J.* 456 (2004).

V. ALTERNATES; SUBSTITUTION

B. Examples

6. Trial court did not abuse its discretion in not interviewing all jurors following one's excusal because he knew the victim's mother. The excused juror stated that he had not told the other jurors, and had lacked a meaningful opportunity to have done so. *State v. R.D.*, 169 *N.J.* 551 (2001).

7. Financial hardship resulting from continued jury service can constitute "inability to continue" under *R.* 1:8-2(d). *State v. Williams*, 171 *N.J.* 151 (2002).
8. Juror properly disqualified and replaced by an alternate during deliberations when it was discovered that he had prior criminal convictions. *State v. Farmer*, 366 *N.J.Super.* 307 (App. Div.), *certif. denied*, 180 *N.J.* 456 (2004).

VIII. EXTRANEOUS INFLUENCES ON JURORS; *EX PARTE* CONTACTS

B. Examples

See State v. DeStefano, 339 *N.J.Super.* 153 (App. Div. 2001).

IX. PUBLICITY

A. Pretrial

See State v. Jenkins, 349 *N.J.Super.* 464 (App. Div.), *certif. denied*, 174 *N.J.* 43 (2002).

X. CONTENT OF DELIBERATIONS

A. Generally

4. Trial court can return jury for further deliberations after question asking about the consequences of a hung jury. *State v. DiFerdinando*, 345 *N.J.Super.* 382 (App. Div. 2001), *certif. denied*, 171 *N.J.* 338 (2002).

XII. RENDERING A VERDICT

In exercising its broad discretion in deciding whether a juror's response reflects agreement with the verdict, the trial court must eliminate all doubt about unanimity. *State v. Milton*, 178 *N.J.* 421 (2004). The purpose of polling is to reveal coerced decisions, and trial judges must elicit clear responses when faced with an uncertain or hesitant juror. *Id.*

JUVENILES

V. WAIVER

A. Involuntary Transfer to Adult Court - *N.J.S.A.* 2A:4A-26; *R.* 5:22-2

Prosecutor's motion to waive a juvenile to adult court, falling within the Attorney General's Guidelines, must be accompanied by a statement of reasons. *State v. R.C.*, 351 *N.J.Super.* 248 (App. Div. 2002). Such waiver decisions are subject to judicial review, and waiver motions must be granted unless the juvenile clearly and convincingly proves that the decision was a patent and gross abuse of discretion. *Id.*

3. Criteria for Involuntary Waiver

Juvenile was entitled to testify at the probable cause portion of his waiver hearing. *State v. J.M.*, 364 *N.J.Super.* 486 (App. Div. 2003), *certif. denied*, 179 *N.J.* 373 (2004). Also, the prosecutor failed to provide a statement of reasons for seeking waiver. *Id.*

VI. DISPOSITION

A. Factual Basis for Plea

An adequate factual basis existed for juvenile's plea to unlawful possession of a paintball gun. *State in re G.C.*, 179 *N.J.* 475 (2004).

D. Credit for Time Served

Juveniles are entitled to the same gap-time credit as adults, and it applies to the time served on the first sentence after a parole revocation. *State v. Franklin*, 175 *N.J.* 456 (2003).

I. Megan's Law

Megan's Law requirements apply to juveniles, but delinquents under age 14 when they committed their offenses may move to terminate those requirements when they turn 18. *In re J.G.*, 169 *N.J.* 304 (2001); *see State in re J.P.F.*, 368 *N.J.Super.* 24 (App. Div.) (Megan's Law registration was mandatory, and trumped the non-disclosure provisions of the Code of Juvenile Justice), *certif. denied*, 180 *N.J.* 453 (2004).

VII. CONSTITUTIONAL AND PROCEDURAL RIGHTS

B. Counsel

1. Required

Juvenile's guilty plea is invalid if he or she is unrepresented by counsel. *In re Civil Commitment of J.D.*, 348 *N.J.Super.* 347 (App. Div. 2002).

D. Fifth Amendment

2. Presence of a Juvenile's Parents During Interrogation

Juvenile validly waived *Miranda* rights even though his parent was not present in the interrogation room throughout the entire interview. *State v. Q.N.,* 179 *N.J.* 165 (2004).

The mother agreed to leave the room and watch the interview, and no *Presha* violation occurred. *Id.*

Parental-involvement requirement of *State v. Presha*, 163 *N.J.* 304 (2000), does not apply to statements of juveniles not subject to custodial interrogation. *State in re J.D.H.*, 171 *N.J.* 475 (2002).

See State in re J.M., 339 *N.J.Super.* 244 (App. Div. 2001).

E. Due Process

Megan's Law does not violate a juvenile's due process, equal protection, or freedom of movement rights. *In re J.G.*, 169 *N.J.* 304 (2001).

H. Jury Trial

Juveniles not entitled to a jury trial. *In re J.G.*, 169 *N.J.* 304 (2001).

J. Sequestration of Witnesses

Trial courts may not sequester a juvenile's parents from the trial, even if they may be called as witnesses. *State in re V.M.,* 363 *N.J.Super.* 529 (App. Div. 2003).

KIDNAPPING, CRIMINAL RESTRAINT AND RELATED OFFENSES

I. KIDNAPPING

B. Substantial Distance/Confinement for a Substantial Period of Time

Handcuffing of elderly victims enhanced the risk of harm to them and was adequate evidence to prove that they were substantially confined for first degree kidnapping. *State v. Denmon*, 347 *N.J.Super.* 457 (App. Div.), *certif. denied*, 174 *N.J.* 41 (2002).

C. Elements of Kidnapping

"Harm" component in the "released unharmed" provision of *N.J.S.A.* 2C:13-1c includes emotional or psychological harm, and disproving unharmed release is a material element of first degree kidnapping resting with the State. *State v. Sherman*, 367 *N.J.Super.* 324 (App. Div.), *certif. denied*, 180 *N.J.* 356 (2004).

As to the failure to release the victim unharmed and in a safe place element, see *State v. Casilla*, 362 *N.J.Super.* 554 (App. Div.), *certif. denied*, 178 *N.J.* 251 (2003).

D. Jury Instructions

As to first degree kidnapping, see *State v. Sherman*, 367 *N.J.Super.* 324 (App. Div.), *certif. denied*, 180 *N.J.* 356 (2004).

II. CRIMINAL RESTRAINT AND RELATED OFFENSES

D. Enticing a Child Into a Motor Vehicle, Structure or Isolated Area

Legislature conditioned defendant's culpability for luring under *N.J.S.A.* 2C:13-6 on the purpose to commit a criminal offense with or against a child, and not on the purpose to commit but a disorderly or petty disorderly persons offense. *State v. Olivera*, 344 *N.J.Super.* 583 (App. Div. 2001) (instruction erroneous).

LAW OF THE CASE

See State v. King, 340 *N.J.Super.* 390 (App. Div. 2001); *State v. Munoz*, 340 *N.J.Super.* 204 (App. Div.) (doctrine is discretionary and flexible), *certif. denied*, 169 *N.J.* 610 (2001).

MERGER

III. MERGER GENERALLY

See State v. Stafford, 365 *N.J.Super.* 6 (App. Div. 2003).

V. MERGER AND JURY INSTRUCTIONS

See State v. Hill, 365 *N.J.Super.* 463 (App. Div.) (because the jury was never asked to specify what crime was the predicate for the felony murder conviction, both the robbery and burglary convictions merged), *certif. denied*, 179 *N.J.* 373 (2004).

VI. MERGER AND SENTENCING

Although driving while intoxicated convictions merge into vehicular homicide and aggravated assault convictions, mandatory drunk driving penalties survive merger. *State v. Wade*, 169 *N.J.* 302 (2001); *State v. Baumann*, 340 *N.J.Super.* 553 (App. Div. 2001). Imposition of concurrent sentences meant that any claimed error as to merger had no effect on defendant's aggregate sentence. *State v. Soto*, 340 *N.J.Super.* 47 (App. Div.), *certif. denied*, 170 *N.J.* 209 (2001).

MISCONDUCT IN OFFICE (*See also* BRIBERY AND CORRUPT INFLUENCES)

I. OFFICIAL MISCONDUCT

B. Definitions - Public Servant, Benefit

Officers of a private, non-profit corporation who were private contractors serving the needs of those with certain disabilities were not "public servants" for purposes of *N.J.S.A.* 2C:30-2. *State v. Mason,* 355 *N.J.Super.* 296 (App. Div. 2002). The corporation was not an arm of the government, its services were contractually limited, and defendants neither performed a regulatory function nor enforced regulations. *Id.*

D. Duties Imposed by Law the Breach of Which May Give Rise to Misconduct Charges

4. Police Officers

Off-duty officer may not provide drugs to another to sell. *State v. Corso,* 355 *N.J.Super.* 518 (App. Div. 2002), *certif. denied,* 175 *N.J.* 547 (2003).

E. Acts "Relating to a Public Servant's Office"

Security guard at a board of education was a public servant, but her joining of a fraud scheme had nothing to do with her status; not all public employees submitting false health benefit claims commit official misconduct. *State v. Decree*, 343 *N.J.Super.* 410 (App. Div.), *certif. denied*, 170 *N.J.* 388 (2001).

MOTOR VEHICLES

I. ARREST (*See also* **ARREST**)

A. Automobile Stops

1. Generally

See State v. Golotta, 178 *N.J.* 205 (2003); *State v. Dangerfield*, 171 *N.J.* 446 (2002).

3. Legality of a Stop

Police may stop a driver for having a license plate obscured by a tinted plastic covering, *i.e.*, rendered less legible, pursuant to *N.J.S.A.* 39:3-77. *State in re D.K.,* 360 *N.J.Super.* 49 (App. Div. 2003).

Police had probable cause to stop defendant in his vehicle after a citizen informant tip that he appeared to be intoxicated upon entering his car and driving off. *State v. Reiner*, 363 *N.J.Super.* 167 (App. Div. 2003), *rev'd o.g.* 180 *N.J.* 307 (2004).

IV. DOUBLE JEOPARDY (*See also* **DOUBLE JEOPARDY**)

In a trial *de novo* in the Law Division, that court is not bound by the municipal court's factual findings, and hence double jeopardy is not triggered when the Law Division judge convicts defendant of drunk driving on an evidential basis rejected by the municipal court. *State v. Kashi*, 360 *N.J.Super.* 538 (App. Div. 2003), *aff'd*, 180 *N.J.* 45 (2004).

VI. DRUNK DRIVING

A. Blood and Urine Tests (*See also* **SEARCH AND SEIZURE**)

Defendant need only be given reasonable access to an independent test, and police need not release him or her absent a family member or friend to transport defendant. *State v. Greeley*, 178 *N.J.* 38 (2003). Such a decision on the officers' part did not impermissibly encroach on defendant's statutory right to an independent blood-alcohol test pursuant to *N.J.S.A.* 39:4-50.2. *Id.*

See State v. DeFrank, 362 *N.J.Super.* 1 (App. Div. 2003) (admission of nurse's certification regarding blood drawing pursuant to *N.J.S.A.* 2A:62A-11).

B. Breathalyzer (Chemical Breath Testing)

Absence of Breathalyzer training course completion date on the test operator's certification card did not render the card invalid. *State v. Sohl*, 363 *N.J.Super.* 573 (App. Div. 2003). Thus the trial court should not have suppressed defendant's Breathalyzer test results. *Id.*

Sequential lack of numbering of alcohol influence report does not require suppression of Breathalyzer evidence. *State v. Jorn*, 340 *N.J.Super.* 192 (App. Div. 2001).

3. Expert Testimony (*See also* **EVIDENCE**)

See State v. Cleverley, 348 *N.J.Super.* 455 (App. Div. 2002).

C. Constitutional Rights

3. Speedy Trial (*See also* **SIXTH AMENDMENT**)

See State v. Fulford, 349 *N.J.Super.* 183 (App. Div. 2002).

F. Refusals/Implied Consent

Defendant's reply to officer that he would take the breathalyzer test but that it was "under duress" did not constitute refusal to take such a test where the officer did not tell defendant, consistent with *State v. Widmaier*, 157 *N.J.* 475 (1999), that his response was unacceptable and that if he refused to take the test a summons would issue alleging a violation of the breathalyzer statute. *State v. Duffy*, 348 *N.J.Super.* 609 (App. Div. 2002).

I. Field Sobriety Testing

See State v. Nikola, 359 *N.J.Super.* 573 (App. Div.), *certif. denied*, 178 *N.J.* 30 (2003).

J. Trial - Evidence & Procedure

3. *R.* 7:2-1(b)(2) requires that an officer sign a summons for drunk driving, but the failure to do so within the 30 days set forth in *N.J.S.A.* 39:5-3 is a curable defect. *State v. Fisher*, 180 *N.J.* 462 (2004). The State may correct the error either by affidavit or testimony demonstrating probable cause, or have the officer sign the ticket. *Id.*

K. Driving While Intoxicated

1. Operating a Motor Vehicle While Intoxicated

See State v. Kashi, 360 *N.J.Super.* 538 (App. Div. 2003), *aff'd*, 180 *N.J.* 45 (2004); *State v. Nikola*, 359 *N.J.Super.* 573 (App. Div.), *certif. denied,* 178 *N.J.* 30 (2003).

L. Right to Independent Tests

See State v. Greeley, 178 *N.J.* 38 (2003) (right is not absolute).

N. Defenses

Common-law defense of necessity could apply to drunk driving where defendant alleged that he was fleeing from a beating he was receiving at a restaurant. *State v. Romano,* 355 *N.J.Super.* 21 (App. Div. 2002).

O. Sentencing

1. Prior Offenses

Defendant, with prior 1982 and 1998 drunk driving convictions, was a third offender for his 2000 drunk driving conviction pursuant to *N.J.S.A.* 39:4-50(a)(3). *State v. Burroughs*, 349 *N.J.Super.* 225 (App. Div.), *certif. denied*, 174 *N.J.* 43 (2002). Defendants have no vested right to continued leniency when committing subsequent drunk driving offenses. *Id.*

See State v. Reiner, 180 *N.J.* 307 (2004) (DWI under *N.J.S.A.* 39:4-50(a) is a separate offense from DWI under *N.J.S.A.* 39:4-50(g)).

PERJURY AND FALSE SWEARING

I. PERJURY

A. Definition

See State v. Neal, 361 *N.J.Super.* 522 (App. Div. 2003).

B. Materiality

The State produced sufficient evidence as to the falsity of defendant's statements to the grand jury regarding his expeditures as a member of a board of education. *State v. Neal*, 361 *N.J.Super.* 522 (App. Div. 2003). False testimony is "material" whenever it tends to prove the central matters in issue or if it establishes or disproves matters themselves bearing crucially on the central issues. *Id.* If the alleged falsehoods are of collateral matters, the materiality requirement may be met by testimony relating to those matters that has the capacity to affect the weight or focus of the evidence bearing on an ultimate issue. *Id.*

I. Sufficiency of the Evidence

See State v. Neal, 361 *N.J.Super.* 522 (App. Div. 2003).

OPEN PUBLIC RECORDS ACT

I. GENERALLY - *N.J.S.A.* 47:1A-1 *et seq.*

Tapes of 911 calls are "government records" within the meaning of *N.J.S.A.* 47:1A-1.1 that generally are to be disclosed when requested pursuant to OPRA, and custodian has the burden of proving that denying access is authorized. *Courier News v. Hunterdon County Prosecutor's Office*, 358 *N.J.Super.* 373 (App. Div. 2003). In this case involving Jayson Williams, neither the potential impact on jury selection nor possible juror confusion satisfied the government's burden of proof. *Id.*; *see Serrano v. South Brunswick Township and Middlesex County Prosecutor's Office*, 358 *N.J.Super.* 352 (App. Div. 2003) (reporter can have access to defendant's 911 call in an ongoing murder prosecution).

POLICE

V. SELECTIVE ENFORCEMENT

Police cannot conduct a field inquiry based on race. *State v. Maryland*, 167 *N.J.* 471 (2001); *see also State v. Francis*, 341 *N.J.Super.* 67 (App. Div. 2001).

Defendant claiming that an MDT check was illegally motivated by race must establish a *prima facie* case. *State v. Segars*, 172 *N.J.* 481 (2002). Once he or she does, the State then must produce evidence of a race-neutral reason for the check; defendant, however, ultimately must prove discriminatory treatment by a preponderance of the evidence. *Id.*

POST-CONVICTION RELIEF (*See generally R.* 3:22-1 *et seq.*)

I. INTRODUCTION

It is the trial court's responsibility to address and decide the questions brought before it; it may not avoid the issues and defer them to the Appellate Division. *State v. Roper*, 362 *N.J.Super.* 248 (App. Div. 2003).

II. GROUNDS FOR RELIEF

Newly discovered third party guilt evidence presented at a post-conviction relief hearing entitled defendant to a new trial. *State v. Ways*, 180 *N.J.* 171 (2004).

Defendant received the effective assistance of counsel during the guilt and penalty phases of his capital prosecution. *State v. Harris*, 181 *N.J.* 391 (2004).

Defendant received ineffective assistance of counsel during the penalty phase of his capital prosecution. *State v. Chew*, 179 *N.J.* 186 (2004).

Defendant was entitled to withdraw his guilty plea because of the physical relationship between his attorney and his mother during the plea and sentencing process. *State v. Lasane*, 371 *N.J.Super.* 151 (App. Div. 2004).

Although defendant failed to present a *prima facie* case of ineffective assistance of counsel, the Appellate Division addressed the claim in the interests of justice and rejected it. *State v. Cusumano*, 369 *N.J.Super.* 305 (App. Div.), *certif. denied*, 181 *N.J.* 546 (2004). Here the child sexual assault victim was severely traumatized, and defense counsel was not ineffective for not objecting to the trial court's admonition that no one enter or leave the courtroom while the child testified. *Id.*

Appellate counsel's failure to raise on direct appeal the trial court's rejection of defendant's aggravated manslaughter plea meant that defendant's subsequent murder conviction was vacated and the aggravated manslaughter plea agreement was reinstated. *State v. Madan*, 366 *N.J.Super.* 98 (App. Div. 2004).

Defendant entitled to post-conviction DNA testing pursuant to *N.J.S.A.* 2A:84A-32a because identity was a significant trial issue and favorable results would give rise to a reasonable probability that a new trial motion would be granted. *State v. Peterson*, 364 *N.J.Super.* 387 (App. Div. 2003). The strength of the State's evidence was irrelevant in deciding if identity was a significant trial issue. *Id.*

The court rules do not require that defendant be "in custody" to seek post-conviction relief. *State v. Roper*, 362 *N.J.Super.* 248 (App. Div. 2003). Here defendant's drug conviction made him eligible for a mandatory extended term if he is again convicted of distributing or possessing drugs with intent to distribute. *Id.*

Defendant need not wait until a direct appeal is resolved to move pursuant to *N.J.S.A.* 2A:84A-32a for a remand to seek DNA testing. *State v. Hogue*, 175 *N.J.* 578 (2003).

Trial counsel effectively represented defendant, and strategically decided not to present an alibi defense because defendant concededly was not bedridden when the crime was committed and thus had been physically capable of committing it. *State v. Drisco*, 355 *N.J.Super.* 283 (App. Div. 2002), *certif. denied*, 178 *N.J.* 252 (2003). Also, trial counsel had no conflict of interest due to defendant's claim that he had been ineffective in representing defendant in another matter. *Id.*

It was not illegal for trial court, upon imposing consecutive sentences, to require defendant to serve a less-restrictive term before serving the more-restrictive term. *State v. Ellis*, 346 *N.J.Super.* 583 (App. Div.), *aff'd o.b.* 174 *N.J.* 535 (2002).

While trial counsel should have interviewed a defense alibi witness before trial, failure to do so did not constitute ineffective assistance of trial counsel because no prejudice existed. *State v. Banks*, 349 *N.J.Super.* 234 (App. Div. 2001), *aff'd o.b.* 171 *N.J.* 466 (2002).

Defendant failed to raise an issue of constitutional magnitude by claiming that the absence of transcripts from his 1979 trial denied him due process -- his 18 year flight from justice and any resultant delay was not the State's fault. *State v. Bishop*, 350 *N.J.Super.* 335 (App. Div.), *certif. denied*, 174 *N.J.* 192 (2002).

Defendant, who untimely alleged ineffective assistance of trial counsel for not seeking DNA testing in his murder case, could apply to the trial court for the release of evidence, if it still existed, for such testing. Defendant must establish by a preponderance of the credible evidence that a reasonable probability exists that the case's outcome would have been different given a favorable DNA result. *State v. Cann*, 342 *N.J.Super.* 93 (App. Div.), *certif. denied*, 170 *N.J.* 208 (2001). Those seeking such testing at public expense must first apply to the Public Defender for funding and receive that office's certification that it will pay for the tests if the motion for DNA testing is granted. *Id.*

Trial judge's prior involvement with prosecuting defendant in a different case mandated recusal from presiding over defendant's trial, and granting of post-conviction relief. *State v. Kettles*, 345 *N.J.Super.* 466 (App. Div. 2001), *certif. denied*, 171 *N.J.* 443 (2002).

Defendants can pursue racial profiling claim on post-conviction relief even if not raised at trial or on direct appeal. *State v. Clark*, 345 *N.J.Super.* 349 (App. Div. 2001).

Defendant's attorney had no conflict of interest, and defendant thus was not entitled to post-conviction relief. *State v. Murray*, 345 *N.J.Super.* 158 (App. Div. 2001), *certif. denied*, 172 *N.J.* 179 (2002).

See State v. Bray, 356 *N.J.Super.* 485 (App. Div. 2003) (claim that appellate counsel was ineffective).

III. PROCEDURAL BARS

A. *R.* 3:22-4

See State v. McIlhenny, 357 *N.J.Super.* 380 (App. Div.) (barring ineffective assistance claims raised in defendant's second petition), *certif. denied*, 176 *N.J.* 430 (2003).

B. *R.* 3:22-5

See State v. Marshall, 173 *N.J.* 343 (2002); *State v. Cusumano*, 369 *N.J.Super.* 305 (App. Div.), *certif. denied*, 181 *N.J.* 546 (2004).

C. *R.* 3:22-12

Defendant's second PCR petition, filed 13 years after his murder conviction, was time barred. *State v. Milne*, 178 *N.J.* 486 (2004). The choice to pursue habeas corpus relief instead of PCR did not extend the time for filing the second petition, and defendant demonstrated neither excusable neglect nor any compelling reason to overcome the procedural bar. *Id.*

Defendant's ineffective assistance claims were time barred, and neither excusable neglect nor the interests of justice required relaxation of the rule. *State v. Goodwin*, 173 *N.J.* 583 (2002).

Defendant's second petition was untimely, and his claims, available to him on direct appeal, fell "light years short" of proving a *prima facie* case of ineffective assistance of plea counsel. *State v. McIlhenny*, 357 *N.J.Super.* 380 (App. Div.), *certif. denied*, 176 *N.J.* 430 (2003).

Defendant's petition was filed within five years of entry of the judgment of conviction even though he was convicted in 1979, fled the jurisdiction before sentencing, was recaptured in 1997, and was sentenced in 1998. *State v. Bishop*, 350 *N.J.Super.* 335 (App. Div.), *certif. denied*, 174 *N.J.* 192 (2002).

Although *R.* 3:22-12 barred defendant's petition filed 60 days late, the Appellate Division reached the merits of his ineffective assistance of trial counsel claim. *State v. Cann*, 342 *N.J.Super.* 93 (App. Div.), *certif. denied*, 170 *N.J.* 208 (2001).

See State v. Marshall, 173 *N.J.* 343 (2002); *State v. Merola*, 365 *N.J.Super.* 82 (App. Div. 2003), *certif. denied*, 179 *N.J.* 312 (2004).

IV. RIGHT TO COUNSEL ON POST-CONVICTION RELIEF

R. 3:22-6(d) requires post-conviction relief counsel to advance all grounds for relief that defendant raises, even if they are deemed to be without merit. *State v. Rue,* 175 *N.J.* 1 (2002).

Although no court rule requires oral argument on a petition and the post-conviction relief court has discretion in permitting it, such discretion should generally be exercised in favor of argument. *State v. Mayron*, 344 *N.J.Super.* 382 (App. Div. 2001).

V. EVIDENTIARY HEARINGS ON POST-CONVICTION RELIEF

Defendant was entitled to an evidentiary hearing to explore defense counsel's explanation of the effect of the community supervision for life consequence of a guilty plea. *State v. Jamgochian*, 363 *N.J.Super.* 220 (App. Div. 2003).

Defendant was entitled to an evidentiary hearing, not to a grant of post-conviction relief, to explore appellate counsel's deficient performance and to determine if prejudice existed. *State v. Bray,* 356 *N.J.Super.* 485 (App. Div. 2003).

Defendant not entitled to an evidentiary hearing to determine the admissibility of his anticipated proffer of evidence as to his state of mind and alleged diminished capacity in a 1985 murder. *State v. Milne,* 178 *N.J.* 486 (2004). Here defendant could not raise the time-barred *Humanik* burden-shifting claim in a post-conviction relief petition. *Id.*

Defendant proved a *prima facie* claim triggering an evidentiary hearing regarding his assertion that trial counsel incorrectly advised him of his sentencing exposure if he was convicted at a trial. *State v. Taccetta*, 351 *N.J.Super.* 196 (App. Div.), *certif. denied,* 174 *N.J.* 544 (2002).

See State v. Murray, 345 *N.J.Super.* 158 (App. Div. 2001), *certif. denied*, 172 *N.J.* 179 (2002).

PRETRIAL INTERVENTION

III. TIME FOR APPLICATION

Unsuccessful PTI application may not be resconsidered after a plea or verdict. *State v. Frangione*, 369 *N.J.Super.* 258 (App. Div. 2004). Here defendant ultimately pleaded guilty to

a third degree crime, but her original PTI application was denied because the indictment also charged her with a second degree crime. *Id.*

IV. ELIGIBILITY FOR PTI

Prosecutor may consider defendant's juvenile record, and aspects of defendant's juvenile and adult histories of dismissed offenses, in reviewing a PTI application pursuant to *N.J.S.A.* 2C:43-12e. *State v. Brooks,* 175 *N.J.* 215 (2002).

VII. REVIEW STANDARDS

B. Standards of Review by Courts

1. Patent and Gross Absence of Discretion

a. Examples

Prosecutor abused discretion in denying PTI for defendant convicted of eluding and drunk driving based upon defendant's prior motor vehicle offenses and drunk driving conviction. *State v. Negran*, 178 *N.J.* 73 (2003). Motor vehicle violations were petty offenses, not crimes, that could not be considered pursuant to *N.J.S.A.* 2C:43-12e(9). *Id.*

Prosecutor did not abuse his discretion in denying PTI for a defendant convicted of possessing assault firearms, and the trial court had improperly substituted its discretion for that of the State. *State v. Motley*, 369 *N.J.Super.* 314 (App. Div. 2004).

See State v. Brooks, 175 *N.J.* 215 (2002) (no such abuse of discretion).

X. TERMINATION

A. Examples

A defendant's receipt of a conditional discharge of a municipal drug charge during PTI admission does not require removal from PTI, and is different from prior receipt of such a discharge before admission. *State v. Allen*, 346 *N.J.Super.* 71 (App. Div. 2001).

PRISONERS AND PAROLE (*See also* **PROBATION, SENTENCING, SEXUAL OFFENSES AND OFFENDERS, VICTIM'S RIGHTS**)

I. COURT APPEARANCES BY PRISONERS

While in rare cases a defendant's Fifth Amendment due process liberty interest in rejecting medical treatment may be overcome and he or she can be compelled to take anti-psychotic medication to make him or her competent to stand trail, the United States Supreme Court set forth the relevant factors trial courts must weigh in deciding this issue. *Sell v. United States*, 539 *U.S.* 166 (2003). The test includes whether an important governmental interest is at stake, whether involuntary medication would significantly further such state interests, whether such medication was necessary to further those interests, and whether administration of the drugs was medically appropriate. *Id.*

II. PRISONER'S CLOTHES AND APPEARANCE

Defense witnesses may not be physically restrained while testifying unless the trial court considers numerous factors and determines at a hearing that restraints are necessary to maintain courtroom security. *State v. Artwell*, 177 *N.J.* 526 (2003). If a witness is restrained, the court must instruct the jury in the clearest and most emphatic terms that the restraints be given no consideration whatsoever in deciding defendant's guilt. *Id.* Also, the trial court cannot require defense witnesses to testify in prison garb. *Id.*

See State v. Grant, 361 *N.J.Super.* 349 (App. Div. 2003) (trial court to hold a hearing before determining if defendant had to testify before the grand jury handcuffed and accompanied by sheriff's officers).

X. RELEASE OF SEX OFFENDERS

See In re Commitment of W.Z., 173 *N.J.* 109 (2002) (civil commitment pursuant to Sexually Violent Predator Act); *In re Commitment of R.S.*, 173 *N.J.* 134 (2002); *In re Commitment of J.D.*, 348 *N.J.Super.* 347 (App. Div. 2002).

Indigents indefinitely committed under the Sexually Violent Predator Act have due process rights to appointed counsel on appeal and free transcripts. *In re Civil Commitment of D.L.*, 351 *N.J.Super.* 77 (App. Div. 2002), *certif. denied*, 179 *N.J.* 373 (2004).

PROBATION (*See also* **PRISONERS AND PAROLE, SENTENCING**).

I. PROBATION AND CONDITIONS

The filing of an arrest warrant "commences" violation of probation proceedings pursuant to *N.J.S.A.* 2C:45-3c. *State v. Nellom*, 178 *N.J.* 192 (2003).

II. REVOCATION HEARING

Because probation revocation proceedings had not commenced during defendant's probationary term, trial court was without jurisdiction to revoke it. *State v. Thomas,* 356 *N.J.Super.* 299 (App. Div. 2002).

PROSECUTORS

II. DISCRETION

Where specific conduct violates more than one statute -- here, second degree endangering under *N.J.S.A.* 2C:24-4a and a fourth degree offense under *N.J.S.A.* 9:6-3 -- the selection of the charge rests in the sound discretion of the prosecutor. *State v. D.A.V.*, 176 *N.J.* 338 (2003).

Prosecutor can consider a defendant's juvenile record and dismissed charges in reviewing a PTI application. *State v. Brooks,* 175 *N.J.* 215 (2002).

State can charge a defendant with both possession of contraband and evidence tampering when he or she has permanently destroyed all or part of the contraband. *State v. Mendez,* 175 *N.J.* 201 (2002).

Prosecutor did not abuse discretion in objecting to defendant's admission into a "drug court" program -- the 42-year-old defendant was arrested with 50 bags of cocaine near a housing project, had a prior drug conviction, had unsuccessfully been treated on probation, and was charged with a second degree crime pursuant to *N.J.S.A.* 2C:35-7.1. *State v. Hester*, 357 *N.J.Super.* 428 (App. Div.), *certif. denied*, 177 *N.J.* 219 (2003).

Motion to waive a juvenile up to adult court must be granted unless the juvenile clearly and convincingly proves that the decision to seek waiver was a patent and gross abuse of discretion. *State v. R.C.*, 351 *N.J.Super.* 248 (App. Div. 2002).

Trial court erred in dismissing superseding indictment with prejudice based on alleged prosecutorial vindictiveness in re-presenting a death by auto case to the grand jury after not obtaining a death by auto count in the first indictment. That court should not have applied a presumption of vindictiveness, but even if that presumption applied the State had presented sufficient evidence of non-vindictive reasons for resubmitting the case. *State v. Gomez*, 341 *N.J.Super.* 560 (App. Div.), *certif. denied*, 170 *N.J.* 86 (2001).

Prosecutors can choose between two applicable offenses to charge as part of the normal kind of discretionary decisions they make. *State v. T.C.*, 347 *N.J.Super.* 219 (App. Div. 2002), *certif. denied*, 177 *N.J.* 222 (2003); *see State v. Medina*, 349 *N.J.Super.* 108 (App. Div.), *certif. denied*, 174 *N.J.* 193 (2002); *State v. D.V.*, 348 *N.J.Super.* 107 (App. Div. 2002), *aff'd o.b.* 176 *N.J.* 338 (2003).

Prosecutor did not violate right to a jury trial in downgrading a third degree theft to a disorderly persons offense with the trial court's consent. *State v. Medina*, 349 *N.J.Super.* 108 (App. Div.), *certif. denied*, 174 *N.J.* 193 (2002). Also, the added collateral "penalty" of civil forfeiture of office did not trigger the right to a jury trial. *Id.*

See State v. Fuller, 356 *N.J.Super.* 266 (App. Div. 2002) (as to excusing potential jurors based on their religious principles), *certif. denied*, 176 *N.J.* 74 (2003).

III. DUTY OF DISCLOSURE

A. Generally

Prosecutor need not disclose to the grand jury a codefendant's letter inculpating self and absolving defendant of liability because it is not "clearly exculpatory." *State v. Evans*, 352 *N.J.Super.* 178 (Law Div. 2001).

B. Exculpatory Evidence (*Brady* violations)

The prosecution's failure to preserve potentially exculpatory evidence does not violate due process unless defendant proves bad faith. *Illinois v. Fisher*, 540 *U.S.* 544 (2004). Here the cocaine seized was not material exculpatory evidence, the police destroyed it in good faith and in accordance with normal practices, and defendant failed to appear in court and escaped apprehension for over 10 years. *Id.*

IV. PROSECUTOR'S COMMENTS AND CONDUCT

A. Failure to Object

See State v. Murray, 338 *N.J.Super.* 80 (App. Div.), *certif. denied*, 169 *N.J.* 608 (2001).

B. Prosecutor Openings

Promising that codfendant would testify and identify defendant as the murderer, but then having codefendant refuse to do so, was reversible error even absent an objection. *State v. Walden*, 370 *N.J.Super.* 549 (App. Div. 2004). "[W]hen dealing with anticipated testimony from . . . any witness from the criminal milieu," prosecutors would be "well advised to keep such potentially prejudicial comments very general and non-committal, or not make them at all . . . ." *Id.*

See State v. Tarlowe, 370 *N.J.Super.* 224 (App. Div. 2004); *State v. Marinez*, 370 *N.J.Super.* 49 (App. Div. 2004).

C. Prosecutor Summations

Prosecutor should not have referred to defendant's earlier failure to claim that the sexual assault victim was a prostitute because it lacked probative value and defendant did not testify at trial. *State v. Muhammed*, 366 *N.J.Super.* 185 (App. Div.), *certif. granted*, 180 *N.J.* 151 (2004).

Prosecutor could argue in closing that defendant, who testified at trial, could listen to the State's case and "choose to craft his version to accommodate those facts." *State v. Daniels*, 364 *N.J.Super.* 357 (App. Div. 2003), *certif. granted*, 179 *N.J.* 312 (2004). The comments were truly directed at credibility and referred to the evidence at length, and the jury was instructed that it determined witness credibility and solely judged the evidence. *Id.*

Prosecutors may in summation play back portions of witnesses' trial testimony, but trial courts exercise sound discretion in addressing such requests on a case-by-case basis after conducting a *N.J.R.E.* 104(a)-type hearing. *State v. Muhammad*, 359 *N.J.Super.* 361 (App. Div.), *certif. denied*, 178 *N.J.* 36 (2003).

See State v. Nelson, 173 *N.J.* 417 (2002); *State v. Smith*, 167 *N.J.* 158 (2001) (improper comments that defense experts would "shade their testimony" to make "hefty fees" in the future); *State v. Abdullah*, 372 *N.J.Super.* 252 (App. Div. 2004) (prosecutor in closing did not offer a personal opinion of defendant's veracity, refer to matters outside the record, or improperly attack the defense); *State v. Walden*, 370 *N.J.Super.* 549 (App. Div. 2004) (prosecutor cannot bolster the testimony of State witnesses via personal beliefs); *State v. Hill*, 365 *N.J.Super.* 463 (App. Div.) (prosecutor's comments were either directed at the evidence or responsive to defense counsel's statements), *certif. granted*, 179 *N.J.* 373 (2004); *State v. Rodriguez*, 365 *N.J.Super.* 38 (App. Div. 2003) (prosecutor should not have referred to murder victim as an "athletic young pretty mother of two children," denigrated as an "excuse" the insanity defense offered, or told the jury to "let the battle for justice be won"; cumulative effect warranted a new trial), *certif. denied*, 180 *N.J.* 150 (2004); *State v. Jones*, 364 *N.J.Super.* 376 (App. Div. 2003) (prosecutor erred in telling the jury that the defense never dusted a gun for fingerprints and that defendant may know something the jurors did not); *State v. Neal*, 361 *N.J.Super.* 522 (App. Div. 2003) (prosecutor cannot characterize defendant's calling of character witnesses "shameless," or designate him as a person who could not care less about what he said or who he said it to, or call upon the jury to hold defendant accountable for betraying the children of his town); *State v. Terrell*, 359 *N.J.Super.* 241 (App. Div.) (improper to comment that defendant had a lot of money in his pockets when he did not have a job, and infer that it was drug proceeds), *certif. denied*, 177 *N.J.* 577 (2003); *State v. Morais*, 359 *N.J.Super.* 123 (App. Div.) (while prosecutor should not have singled out a juror in some of his closing remarks, reference was harmless; mention of "blue wall" was fair comment and responded to defense counsel's closing), *certif. denied*, 177 *N.J.* 572 (2003); *State v. Jang*, 359 *N.J.Super.* 85 (App. Div.) (although remarks about murder victim's character were inappropriate, they were harmless), *certif. denied*, 177 *N.J.* 492 (2003); *State v. Overton,* 357 *N.J.Super.* 387 (App. Div.) (repeatedly mistaking requisite mental state was plain error because a possibility existed that jury would follow it), *certif. denied*, 177 *N.J.* 219 (2003); *State v. Negron,* 355 *N.J.Super.* 556 (App. Div. 2002) (prosecutor violated *State v. Smith*, 167 *N.J.* 158 (2001), by focusing on what the defense experts were paid; also accused defense counsel of misstating facts and of coaching and paying witnesses, and claimed that State witnesses were unpaid and had no reason to lie); *State v. Cooke*, 345 *N.J.Super.* 480 (App. Div. 2001) (comments involving defendant's right not to testify, matters not in evidence, and personal views, if error, cured by court's instructions), *certif. denied*, 171 *N.J.* 340 (2002); *State v. Tilghman*, 345 *N.J.Super.* 571

(App. Div. 2001) (reference to defendant's post-arrest silence and request for attorney, and reference to credibility of elderly victims, improper); *State v. Shelton*, 344 *N.J.Super.* 505 (App. Div. 2001) (reference to fingerprint evidence based on evidence in the record and made in response to defense counsel's closing argument), *certif. denied*, 171 *N.J.* 43 (2002); *State v. Francis*, 341 *N.J.Super.* 67 (App. Div. 2001); *State v. Munoz*, 340 *N.J.Super.* 204 (App. Div.) (prosecutor's closing comments were a direct response to defense counsel's summation, and isolated remark about a "concocted" alibi was cured by instruction), *certif. denied*, 169 *N.J.* 610 (2001); *State v. Murray*, 338 *N.J.Super.* 80 (App. Div.) (remark that DEA agent had no motive to lie was proper response to defendant's comment challenging agent's credibility), *certif. denied*, 169 *N.J.* 608 (2001).

V. DIRECT/CROSS EXAMINATION

Prosecutor should not ask defense witness if defendant, arrested possessing drugs and nearly $1,000 in many denominations, had a job. *State v. Terrell*, 359 *N.J.Super.* 241 (App. Div.), *certif. denied*, 177 *N.J.* 577 (2003).

Witnesses should make no reference to a defendant's invocation of the right to counsel. *State v. Olivera*, 344 *N.J.Super.* 583 (App. Div. 2001).

Prosecutor should not ask defendant if State witnesses are lying. *State v. T.C.*, 347 *N.J.Super.* 219 (App. Div. 2002), *certif. denied*, 177 *N.J.* 222 (2003).

VI. MISCELLANEOUS CASES

Mere allegations of misconduct involving some members of a prosecutor's office do not disqualify the entire office. *State v. Harvey,* 176 *N.J.* 522 (2003).

PUBLIC DEFENDER (*See also* **COSTS**)

F. Ancillary Services

Public Defender is to provide free transcripts to indigents appealing their indefinitely committed status under the Sexually Violent Predator Act. *In re Civil Commitment of D.L.*, 351 *N.J.Super.* 77 (App. Div. 2002), *certif. denied*, 179 *N.J.* 373 (2004).

RACKETEERING (RICO)

II. ELEMENTS

A. Enterprise

In charging the jury as to a racketeering enterprise, the State must prove that the enterprise in which defendant participated "affected trade or commerce" pursuant to *N.J.S.A.* 2C:41-2c. *State v. Casilla*, 362 *N.J.Super.* 554 (App. Div.), *certif. denied*, 178 *N.J.* 251 (2003).

REMOVAL (*See also* **FORFEITURE, MISCONDUCT IN OFFICE**)

I. FORFEITURE OF OFFICE REQUIRED FOR THE COMMISSION OF AN OFFENSE

C. Offenses for Which Forfeiture May Be Required

1. Disorderly Person Offense

Board of education could apply for forfeiture of defendant's job as a maintenance worker following his loitering for the purpose of procuring narcotics conviction. *State v. Och*, 371 *N.J.Super.* 274 (App. Div. 2004).

Ordinary "abuse of discretion" standard applies to State's sentencing-related decision not to seek waiver of forfeiture pursuant to *N.J.S.A.* 2C:51-2e following defendant's disorderly persons or petty disorderly persons conviction. *Flagg v. Essex County Prosecutor*, 171 *N.J.* 561 (2002). Attorney General's suggested guidelines for deciding whether or not to seek waiver of forfeiture should be formally promulgated to promote state-wide uniformity. *Id.*; *see State v. Gismondi*, 353 *N.J.Super.* 178 (App. Div. 2002) (petty disorderly persons offense of harassment required forfeiture).

4. Offenses Involving or Touching Upon a Public Office, Position, or Employment

Fact that defendant occasionally came into contact with police housed in the municipal building where he worked was not sufficient to involve and touch upon his public employment as a municipal laborer. *State v. Pavlik*, 363 *N.J.Super.* 307 (App. Div. 2003).

Prior federal convictions did not include offenses involving or touching individual's prior office as a mayor under *N.J.S.A.* 2C:51-2d. *McCann v. Clerk of the City of Jersey City*, 167 *N.J.* 311 (2001). McCann still could not run for mayor, though, because of the Faulkner Act (*N.J.S.A.* 40:69A-1 to 149), which the city had adopted and which

precludes any person from such a position if convicted of a crime or offense involving moral turpitude. *Id.*

Off-duty police officer who pointed his service revolver at another, and was convicted of fourth degree aggravated assault, had committed a crime that "touched on" his public office and warranted a bar of future public office. *State v. Williams,* 355 *N.J.Super.* 579 (App. Div. 2002).

Police officer's off-duty drunk driving, terrorization of a neighborhood, false 911 call, firing of service handgun, use of badge to deter investigation, and failure to report this to his superiors involved and touched his public office. *State v. Gismondi*, 353 *N.J.Super.* 178 (App. Div. 2002).

F. Standing To Initiate Forfeiture Provisions

Board of education has standing to pursue forfeiture of employee's job even if the prosecutor will not. *State v. Och*, 371 *N.J.Super.* 274 (App. Div. 2004).

RESISTING ARREST (*See also* **ELUDING, ESCAPE, FLIGHT**)

I. GENERALLY

See State v. Brannon, 178 *N.J.* 500 (2004); *State v. Ambroselli*, 356 *N.J.Super.* 377 (App. Div. 2003).

RESTITUTION

Restitution to owner of a stolen motor vehicle is mandatory under *N.J.S.A.* 2C:43-2.1, and does not depend on defendant's ability to pay. *State v. Jones*, 347 *N.J.Super.* 150 (App. Div.), *certif. denied*, 172 *N.J.* 181 (2002). This also includes payments to the owner's insurance company, and not just of the deductibles. *Id.*

See State v. Pessolano, 343 *N.J.Super.* 464 (App. Div.) (remand to reconsider restitution), *certif. denied*, 170 *N.J.* 210 (2001).

RETROACTIVITY

I. GENERAL PRINCIPLES

A. Federal Retroactivity Law

The rule in *Ring v. Arizona*, 536 *U.S.* 584 (2002), is not retroactive on collateral review. *Schriro v. Summerlin*, 124 *S.Ct.* 2519 (2004).

The rule in *Apprendi v. New Jersey*, 530 *U.S.* 466 (2000), is not retroactive to cases on federal habeas corpus review. *In re Turner*, 267 *F.*3d 225 (3d Cir. 2001).

See Horn v. Banks, 536 *U.S.* 266 (2002); *Rogers v. Tennessee*, 532 *U.S.* 451 (2001).

B. State Retroactivity Law

See State v. Johnson, 166 *N.J.* 523 (2001) (Supreme Court's construction of NERA not retroactive); *State v. Yanovsky*, 340 *N.J.Super.* 1 (App. Div. 2001) (*Carty* given limited retroactive effect).

II. DEGREE OF RETROACTIVE EFFECT

New rule that defendants pleading guilty to sexually violent offenses be informed of the collateral possibility of civil commitment pursuant to the Sexually Violent Predator Act to be given limited retroactive effect. *State v. Bellamy, 178 N.J.* 127 (2003).

The need for reasonable articulable suspicion to seek consent to search a motor vehicle is retroactive to all cases pending in the trial court and on direct appeal as of June 23, 2000. *State v. Carty*, 174 *N.J.* 351 (2002).

See State v. Tavares, 364 *N.J.Super.* 496 (App. Div. 2003) (*State v. Johnson*, 168 *N.J.* 608 (2001), applies retroactively).

IV. SPECIFIC APPLICATION OF RETROACTIVITY CRITERIA

A. Search and Seizure

Because racial profiling involves no new rule of law, it is not subject to a retroactivity analysis. *State v. Clark*, 345 *N.J.Super.* 349 (App. Div. 2002); *but see State v. Carty*, 174 *N.J.* 351 (2002) (limited retroactivity afforded to requirement of reasonable suspicion for consent searches of motor vehicles).

ROBBERY

I. ELEMENTS

B. Robbery

2. Assault Element

Defendant can be convicted of robbery even if the jury is split in deciding against whom he used force. *State v. Gentry*, 370 *N.J.Super.* 413 (App. Div. 2004). The fact on which the jurors disagreed was not material and did not undermine the unanimity as to theft and use of force. *Id.*

SEARCH AND SEIZURE

I. GENERAL PRINCIPLES

Fourth Amendment permits police to use highway checkpoints to stop motorists and ask for information about a recent area crime. *Illinois v. Lidster*, 540 *U.S.* 419 (2004).

Police can approach bus passengers at random to ask questions and request consent to search, and are not required to advise them that they need not cooperate. *United States v. Drayton*, 536 *U.S.* 194 (2002).

State courts cannot interpret the federal constitution to provide greater protection than does the United States Supreme Court. *Arkansas v. Sullivan*, 532 *U.S.* 1769 (2001).

Exigent circumstances justified the warrantless retrieval of telephone numbers from defendant's pager seized when he was arrested shortly after committing an armed robbery with an accomplice -- the accomplice was at large, defendant did not possess the gun fired at the victim, the pager beeped while in police custody, and incoming pages could have deleted numbers stored in the pager's memory. *State v. DeLuca*, 168 *N.J.* 626 (2001).

The taking of blood from a DWI suspect constitutes a search, and while the police need no warrant to extract it they may not use objectively unreasonable force to do so. *State v. Ravotto*, 169 *N.J.* 227 (2001).

II. WARRANT SEARCHES

A suspect's prior arrests for assaulting a police officer and unlawful possession of a weapon can support issuance of a no-knock search warrant. *State v. Jones*, 179 *N.J.* 377 (2004). Generally, arrest records disclosed in supporting affidavits should include dispositional information, and, if not, an explanation that reasonable efforts were made to find such information. *Id.*

Police articulated a reasonable, particularized suspicion of danger to officer safety to justify a no-knock search warrant for the home of defendant who had been arrested for aggravated assault and unlawfully possessing a weapon. *State v. Sanchez,* 179 *N.J.* 409 (2004).

In executing a no-knock search warrant of defendant's apartment, police could arrest defendant outside his apartment and charge him with constructively possessing drugs and a loaded gun found inside. *State v. Spivey*, 179 *N.J.* 229 (2004).

Defective domestic violence TRO and included warrant were invalid. *State v. Cassidy*, 179 *N.J.* 150 (2004).

Police, who possessed a "knock and announce" search warrant for narcotics trafficking and weapons charges, were justified in breaking down an apartment door upon waiting 15-20 seconds after knocking and announcing their presence. *United States v. Banks*, 540 *U.S.* 31 (2003). The officers feared the imminent loss of evidence if they waited any longer. *Id.*

Search warrant was used to seize child pornography on defendant's home computer, and defendant had no expectation of privacy in e-mails he sent with pornographic images or in the subscriber information stored at AOL's headquarters. *State v. Evers*, 175 *N.J.* 355 (2003). Even if federal or other state's law was violated, the Court would not invoke the exclusionary rule because none of the rule's purposes would be advanced. *Id.*

Probable cause existed to obtain a search warrant for the house of a sheriff's officer caught on videotape stealing evidence. *State v. Pineiro*, 369 *N.J.Super.* 65 (App. Div.), *certif. denied*, 181 *N.J.* 285 (2004). Probable cause exists to search a thief's residence when stolen merchandise consists of items likely to be used or stored in that residence. *Id.*

An inadequate affidavit rendered a search warrant's "no knock" provision clearly defective. *State v. Tavares*, 364 *N.J.Super.* 496 (App. Div. 2003).

Officers' lack of field testing of suspected cocaine purchased during a confidential informant's three controlled buys did not gut the finding of probable cause supporting a no-knock search warrant. *State v. Jones*, 179 *N.J.* 377 (2004). Also, a codefendant's prior arrest for aggravated assault on a police officer and possession of a weapon did not support issuance of the no-knock warrant. *Id.*

To justify a "no-knock" search warrant, police (1) must have a reasonable, particularized suspicion that a no-knock entry was required to prevent the destruction of evidence, the officers'

safety, or to effect the arrest or seizure of evidence; (2) must articulate the reasons for such suspicion, which can be based on the totality of the circumstances facing them; and (3) must articulate a minimum level of objective justification to support a no-knock entry. *State v. Johnson*, 168 *N.J.* 608 (2001). The Court also rejected any good-faith exception. *Id.*

Two unobserved controlled drug buys by a confidential informant in an apartment building, together with some corroboration of the informant's tip -- here verifying the apartment's telephone number -–, demonstrated probable cause to obtain a search warrant for that apartment. That the police could not see the informant enter defendant's apartment did not prevent a probable cause finding under the totality of the circumstances test. *State v. Sullivan*, 169 *N.J.* 204 (2001).

Fact that drug traffickers are in a multi-dwelling apartment building with a fire escape does not justify a no-knock search warrant for an apartment. *State v. Ventura*, 353 *N.J.Super.* 251 (App. Div. 2002).

See State v. Johnson, 352 *N.J.Super.* 15 (App. Div. 2002) (standards for issuing a search warrant under the Prevention of Domestic Violence Act).

III. WARRANTLESS SEARCHES

A. Abandonment

See State v. Linton, 356 *N.J.Super.* 255 (App. Div. 2002) (police could enter abandoned building to find defendant, who discarded drugs in front of them and who lived elsewhere; defendant had no expectation of privacy in another's vacant property); *State v. Premone,* 348 *N.J.Super.* 505 (App. Div. 2002) (remand to the trial court to determine if seizure of a bag and its contents in a motel room by motel employees, and subsequent search of it by the police, was proper under abandonment exception to the warrant requirement).

B. Automobile Cases

1. Stops

An anonymous 911 caller reporting that a vehicle was being driven erratically permitted the police to stop that vehicle to investigate before observing any indicia of intoxication. *State v. Golotta*, 178 *N.J.* 205 (2003).

Tinted plastic cover that obscured a license plate, *i.e.*, rendered it less legible, constituted a proper reason to conduct a motor vehicle stop. *State in re D.K.*, 360 *N.J.Super.* 49 (App. Div. 2003).

Darkly tinted windows present a significant obstruction that provide sufficient reason for the police to inspect such vehicles. *State v. Cohen*, 347 *N.J.Super.* 375 (App. Div. 2002).

Trooper's continued detention and brief questioning of a car passenger while waiting for registration and license checks were reasonable because not all suspicion of wrong-doing had been dispelled at that time. *State v. Pegeese*, 351 *N.J.Super.* 25 (App. Div. 2002).

2. Automobile Exception

Police had probable cause to arrest defendant, a front-seat passenger in a car stopped for speeding, after finding cocaine and a roll of cash inside the vehicle's passenger compartment and where all occupants denied ownership of the contraband. *Maryland v. Pringle*, 540 *U.S.* 366 (2003).

Police had no probable cause to search defendant's car for drugs after they arrested him outside the vehicle for outstanding warrants and he dropped drugs from his jacket sleeves. *State v. Wilson*, 178 *N.J.* 7 (2003).

Police had probable cause and exigent circumstances to search defendant's car, identified by citizen eyewitnesses as the one used after the crime and found a block from the crime scene, for a gun fired on a public street near the Atlantic City boardwalk. *State v. Wilson*, 362 *N.J.Super.* 319 (App. Div.), *certif. denied*, 178 *N.J.* 250 (2003). While defendant was already in custody when the car was searched, police were faced with a dangerous situation where the missing and presumably loaded gun needed to be found quickly. *Id.*

Exception permitted search of defendant's car where, during a pat-down, an officer discovered drug paraphernalia on defendant's person, had smelled burnt marijuana on him, and had observed a plastic bag protruding from the console of defendant's car. *State v. Nishina*, 175 *N.J.* 502 (2003).

Exception does not permit the search of a car absent probable cause to believe that drugs were present -- defendant was a passenger and had exited the vehicle before even knowing the police were present, was arrested on outstanding warrants, and discarded drugs. *State v. Wilson*, 354 *N.J.Super.* 548 (App. Div. 2002), *aff'd*, 178 *N.J.* 7 (2003).

See State v. Hammer, 346 *N.J.Super.* 359 (App. Div. 2001) (seeing open beer container in car, and hollow-point bullets falling from driver's pocket, gave rise to exigent circumstances and probable cause to search the car for weapons).

3. Search Incident to Arrest

Officers have the right, after validly arresting defendant for a motor vehicle violation and taking him or her into custody, to search defendant's person. *State v. Dangerfield*, 171 *N.J.* 446 (2002).

C. Consent

Police may search an apartment based on consent given by a resident appearing to have control of it. *State v. Farmer*, 366 *N.J.Super.* 307 (App. Div.), *certif. denied*, 180 *N.J.* 456 (2004). Nor were the officers compelled to advise the extremely cooperative resident of her right to refuse consent, given the lack of any suggestion that she would have declined to give it . *Id.*

Police must have reasonable articulable suspicion of criminal wrongdoing before seeking consent to search a lawfully stopped vehicle. *State v. Carty*, 170 *N.J.* 632, *op. modified*, 174 *N.J.* 351 (2002). This new rule does not apply to roadblocks, checkpoints, and the like. *Id.*

No effective consent existed to search a pack defendant carried because he was not told of his right to refuse consent. *State v. Todd*, 355 *N.J.Super.* 132 (App. Div. 2002).

See State v. Pegeese, 351 *N.J.Super.* 25 (App. Div. 2002) (remand to trial court for reconsideration in light of *Carty*).

See State v. Yanovsky, 340 *N.J.Super.* 1 (App. Div. 2001) (agreeing with *Carty*); *State v. Leslie*, 338 *N.J.Super.* 269 (App. Div. 2001) (scope of consent to search car).

D. Home Searches

United States Supreme Court reaffirmed *Payton v. New York*, 445 *U.S.* 573 (1980), in holding that, absent exigent circumstances, a home may not be entered without a warrant. *Kirk v. Louisiana*, 536 *U.S.* 635 (2002).

Police, who had an arrest warrant for defendant, could enter hotel room and arrest him where the door was ajar and officers could see defendant in the room. *State v. Cleveland*, 371 *N.J.Super.* 286 (App. Div. 2004).

Police were invited into the home of defendant, a sheriff's officer, and saw stolen items in plain view. *State v. Pineiro*, 369 *N.J.Super.* 65 (App. Div.), *certif. denied*, 181 *N.J.* 285 (2004). Thus a warrantless seizure would have been proper had they not possessed a search warrant. *Id.*

Inevitable discovery doctrine did not save warrantless entry of defendant's apartment using a steel "ram" to secure the premises until a search warrant was issued. *State v. Lashley*, 353 *N.J.Super.* 405 (App. Div. 2002).

The warrantless use of a thermal-imaging device aimed at a home from a public street to detect heat within constituted a search because such information could not otherwise have been obtained without physical intrusion into a constitutionally protected area. Such a search is presumed unreasonable without a warrant. *Kyllo v. United States*, 533 *U.S.* 27 (2001).

Defendant had a legitimate expectation of privacy in his hospital room at a state psychiatric hospital. *State v. Stott*, 171 *N.J.* 343 (2002).

Absent consent or exigency, police may not lawfully execute an arrest warrant in a dwelling unless they have an objectively reasonable basis for believing that the person named in the warrant both resides there and was inside at the time. *State v. Miller*, 342 *N.J.Super.* 474 (App. Div. 2001). Here police did not gain the homeowner's consent prior to entry, were acting under an arrest warrant only, and no special circumstances justified their actions.

Only reasonable suspicion is needed to search a probationer's home without a warrant where an accepted condition of probation permits such searches. *United States v. Knights*, 534 *U.S.* 112 (2001).

Although armed with a warrant for defendant's arrest, police could not, after arresting and removing him from his motel room's bathroom, search that bathroom incident to the arrest.

State v. Rose, 357 *N.J.Super.* 100 (App. Div.), *certif. denied*, 176 *N.J.* 429 (2003). Fact that defendant's girlfriend was in the motel room gave rise to no reasonable basis to assume that she would destroy evidence. *Id.*

Police securing a home while seeking a search warrant could enter the open garage to better secure it. Exigent circumstances justified this action because defendant was believed to be transporting drugs from his home, his whereabouts were unknown, and drugs, a gun, and ammunition for another gun were found in the search of a home down the street. *State v. Myers*, 357 *N.J.Super.* 32 (App. Div. 2003).

See La v. Hayducka, 269 *F.Supp.*2d 566 (D.N.J. 2003).

E. Community Caretaking Function

Police could direct defendant, the subject of a missing persons report, to exit his vehicle and place him in a police car while they obtained details regarding the report. *State v. Diloreto*, 180 *N.J.* 264 (2004). The officers acted in good faith and in an objectively reasonable manner because, although the missing persons report had been withdrawn, their computers still listed defendant as such a person. *Id.* They could pat down defendant before placing him in their vehicle, and the discovery of a large metal object (loaded handgun magazine) justified their asking him the gun's location (under the front seat). *Id.*

Police dispatched to an "open line" 911 call are faced with a presumptive emergency requiring an immediate response. *State v. Frankel*, 179 *N.J.* 586 (2004). Officers could walk through the premises to verify that no one within was in danger even though defendant denied making the call and refused to allow the police to enter. A need existed for prompt action in response to such calls, and the police acted reasonably and prudently when confronted with a situation of unknown dimension. *Id.*

See State v. Cassidy, 179 *N.J.* 150 (2004); *State v. Cohen*, 347 *N.J.Super.* 375 (App. Div. 2002) (police can inspect vehicles with darkly tinted windows under community caretaking function).

F. Independent Source

To invoke the independent source rule, the State (1) must demonstrate, wholly independent of the knowledge, evidence, or other information acquired as a result of a prior illegal search, that probable cause existed to conduct the challenged search without the unlawfully obtained information; (2) must demonstrate by clear and convincing evidence that police would have sought a warrant without the tainted evidence; and (3) must demonstrate by clear and convincing evidence that the initial impermissible search was not the product of flagrant police misconduct, regardless of the strength of their proofs under the first and second prongs. *State v. Holland*, 176 *N.J.* 344 (2003). And when the search involves the illegal entry into a dwelling, that fact is relevant to the analysis. *Id.*

Handgun and witness' testimony admissible against defendant in murder prosecution under independent source and inevitable discovery rules. *State v. James*, 346 *N.J.Super.* 441 (App. Div.), *certif. denied*, 174 *N.J.* 193 (2002).

G. Inevitable Discovery

See State v. Todd, 355 *N.J.Super.* 132 (App. Div. 2002); *State v. James,* 346 *N.J.Super.* 441 (App. Div.), *certif. denied*, 174 *N.J.* 193 (2002).

H. Plain View, Plain Smell, Plain Touch

1. Plain View

See State v. Johnson, 171 *N.J.* 192 (2002) (officers, acting on a tip by a citizen informant, observed defendant place an object near a post on a porch, and properly went onto the porch to see what he had put down); *State v. Pineiro*, 369 *N.J.Super.* 65 (App. Div. 2004).

Officer had only a "hunch" -- not probable cause -- to believe defendant's water bottle contained a date-rape drug. *State v. Sansotta*, 338 *N.J.Super.* 486 (App. Div. 2001).

2. Plain Smell

See State v. Nishina, 175 *N.J.* 502 (2003) (marijuana).

I. Police Encounters

1. Field Inquiry

Requiring a person detained under suspicious circumstances to identify himself or herself does not violate the Fourth Amendment. *Hiibel v. Sixth Jud. D. Ct., Nev.,* 124 *S.Ct.*

2451 (2004). Interrogation relating to identity does not, by itself, constitute a Fourth Amendment seizure. *Id.*

Officer was justified in approaching defendant and asking for credentials where defendant was on school property late at night and offered no legitimate explanation for being on the premises. *State v. Nishina*, 175 *N.J.* 502 (2003).

While police may conduct a field inquiry absent any suspicious activity, they cannot use race to question individuals. *State v. Maryland*, 167 *N.J.* 471 (2001); *see also State v. Dangerfield*, 339 *N.J.Super.* 229 (App. Div. 2001), *aff'd as modified*, 171 *N.J.* 446 (2002).

Articulable suspicion of illegal conduct is needed to support a stop, and although, absent this, officer could approach and question defendant sitting in car, defendant could refuse to answer and was free to leave without showing identification. *State v. Stampone*, 341 *N.J.Super.* 247 (App. Div. 2001).

Police need not have reasonable suspicion that a crime is occurring before asking for identification from a person lawfully in a public place; such questioning does not transform a field inquiry into a *Terry* stop. *State v. Sirianni*, 347 *N.J.Super.* 382 (App. Div.), *certif. denied*, 172 *N.J.* 178 (2002).

2. Investigative Detention

An experienced officer had a reasonable, articulable suspicion to stop defendant, who passed a cigarette box to another man and fled upon seeing the officer. *State v. Moore*, 181 *N.J.* 40 (2004). But more was needed to establish probable cause to seize the box. *Id.*

To obtain an investigative detention order and DNA samples, the State must support the application with affidavits, not certifications. *In re Investigation of the Alleged Aggravated Sexual Assault of A.S.*, 366 *N.J.Super.* 402 (App. Div. 2004). Hearsay may provide an adequate basis for issuance of such orders, but not double or triple hearsay. *Id.*

Reasonable suspicion existed to stop defendant when an anonymous 911 caller reported that his vehicle was being operated erratically. *State v. Golotta*, 178 *N.J.* 205 (2003). A 911 call carries enhanced reliability, the conduct involved the temporary stop of a motor vehicle based on reasonable suspicion, and drunk drivers pose a grave threat to public safety. *Id.*

Reasonable suspicion existed to stop defendant, and smell of burnt marijuana on his person justified a pat-down search. *State v. Nishina*, 175 *N.J.* 502 (2003).

Totality of the circumstances did not create reasonable articulable suspicion to justify an investigate detention where an anonymous tip described two men carrying drugs and their travel routes, the police detained defendant and his companion exiting a bus and took them to a police office at the terminal, and questioned them in a manner presupposing criminal activity. *State v. Rodriguez*, 172 *N.J.* 117 (2002). Contrary to *Florida v. J.L.*, 529 *U.S.* 266 (2000), the informant provided no explanation or basis of knowledge as to his assertion of illegality, and neither defendant nor his cohort did anything suspicious or unusual. *Id.*

A reliable confidential informant's tip regarding defendant's drug activities permitted the police to seize defendant at a train station where informant had arranged to meet him and where she identified him for the officers. *State v. Williams*, 364 *N.J.Super.* 23 (App. Div. 2003).

Because the police had not arrested defendant, even though probable cause existed to so arrest him, and because no reasonable basis existed to believe that he was armed, his pack was not validly searched incident to arrest before he entered a police vehicle. *State v. Todd*, 355 *N.J.Super.* 132 (App. Div. 2002).

Anonymous call about three black males being involved in a drug transaction, one of whom was armed and using a particular pay phone, did not justify the stop of a black male at the phone 45 minutes later who did not respond to police questioning and who did not agree to be patted down. *State v. Richards*, 351 *N.J.Super.* 289 (App. Div. 2002).

If objectively reasonable concern for officer safety exists under the totality of the circumstances, he or she may retrieve contents of a bulge from defendant's person when

unable to identify it as a weapon during a pat-down search. *State v. Roach*, 172 *N.J.* 19 (2002).

Placing item in waist band upon leaving a train did not support an investigatory stop. *State v. Maryland*, 167 *N.J.* 471 (2001); *see also State v. Love*, 338 *N.J.Super.* 504 (App. Div. 2001).

See United States v. Arvizu, 534 *U.S.* 266 (2002) (focus must remain on the totality of the circumstances, and courts should afford due weight to the factual inferences drawn by law enforcement officers); *State v. Nikola*, 359 *N.J.Super.* 573 (App. Div.), *certif. denied*, 178 *N.J.* 30 (2003).

3. Arrest

An experienced narcotics detective who observes a defendant receive a small item in exchange for cash in a high drug trafficking areas has probable cause to arrest and search incident to that arrest. *State v. Moore*, 181 *N.J.* 40 (2004).

See Arkansas v. Sullivan, 532 *U.S.* 769 (2001) (officer's subjective intentions irrelevant for Fourth Amendment probable cause analysis); *State v. Dangerfield*, 171 *N.J.* 346 (2002) (as to disorderly and petty disorderly persons offenses); *State in re J.M.*, 339 *N.J.Super.* 244 (App. Div. 2001).

J. Police Action Based On Citizen's Tips, Informant's Tips or Anonymous Tips

1. Citizen's Tips

See State v. Reiner, 363 *N.J.Super.* 167 (App. Div. 2003) (tip that defendant appeared to be drunk when he was seen entering his car and driving off constituted probable cause to stop him), *aff'd o.g.* 180 *N.J.* 307 (2004); *State v. Nikola*, 359 *N.J.Super.* 573 (App. Div.) (information that an identified citizen informant gives police, based on direct personal observations, has a substantial degree of reliability), *certif. denied*, 178 *N.J.* 30 (2003).

2. Informant's Tips

See State v. Cleveland, 371 *N.J.Super.* 286 (App. Div. 2004); *State v. Williams*, 364 *N.J.Super.* 23 (App. Div. 2003) (reliable confidential informant tipped off police to defendant's drug activities).

3. Anonymous Tips

See State v. Rodriguez, 172 *N.J.* 117 (2002); *State v. Patton*, 362 *N.J.Super.* 16 (App. Div.) (remand to trial court pursuant to *Florida v. J.L.*, 529 *U.S.* 266 (2000)), *certif. denied*, 178 *N.J.* 35 (2003).

K. Border and Airport Searches

Investigatory stop of defendant at the Newark Airport baggage carousel was justified where she acted suspiciously and the carousel eventually held but one bag, to which a drug-sniffing dog alerted. *State v. Brown*, 352 *N.J.Super.* 338 (App. Div.), *certif. denied,* 174 *N.J.* 544 (2002). After giving suspicious answers to detectives, defendant admitted the bag was hers; no *Miranda* warnings were necessary because she was not then under arrest, and no consent to subsequently search the bag was needed because probable cause existed to arrest defendant and the search was incident to that arrest. *Id.*

Trial court could deny suppression without an evidentiary hearing because no material facts were disputed -- those entering the United States are subject to routine border searches (initial stop and questioning, search of luggage and personal effects, removal of outer garments, and pat down), which are reasonable and require no particularized suspicion. *State v. Green*, 346 *N.J.Super.* 87 (App. Div. 2001). Here defendant exited a plane in Newark from Jamaica, and removal of his shoes and discovery of drugs in them was a routine search. *Id.*

Stop of airplane passenger at Newark Airport by an experienced detective was based on reasonable suspicion that she was transporting drugs -- she was flying from a known drug source city on a "bulk" ticket issued by a travel agency often used by drug traffickers, had carry-on luggage, an expired identification card, and was nervous during questioning. *State v. Stovall*, 170 *N.J.* 346 (2002). Even a group of "innocent" circumstances can, in the aggregate, constitute reasonable suspicion. *Id.*

L. Roadblocks

See State v. Carty, 170 *N.J.* 632 (*Carty* rule not applicable to roadblocks or checkpoints), *op. modified*, 174 *N.J.* 351 (2002).

M. Inventory Searches

Inventory search rules apply to vehicles impounded in contemplation of civil forfeiture. *State v. One 1994 Ford Thunderbird*, 349 *N.J.Super.* 352 (App. Div. 2002).

O. "Special Needs" searches

See Ferguson v. City of Charleston, 532 *U.S.* 67 (2001) (hospital patient who tested positive for drugs in urine test).

See State v. Perkins, 358 *N.J.Super.*151 (App. Div. 2003) (seizure of 85 guns pursuant to a domestic violence complaint satisfied "special needs" search as part of the State's interest in protecting the public, but seized weapons could not be used in a subsequent criminal proceeding unless an exception to the warrant requirement also was met).

Parolees have a reduced level of protection from administrative searches, and the state constitution requires no greater limitation on a parole officer's right to search than does federal law. *State v. Maples*, 346 *N.J.Super.* 408 (App. Div. 2002).

IV. PROCEDURES REGARDING USE OF THE EVIDENCE

B. Standing

Defendant had no standing under the federal and state constitutions to challenge a vehicle search because he was not in the car when the police searched it, he was unconnected to the motor vehicle stop itself, and a week had passed between the crime and the search. *State v. Bruns*, 172 *N.J.* 40 (2002).

SELF-DEFENSE

III. USE OF FORCE IN SELF-PROTECTION

J. Imperfect Self-Defense

See State v. Tierney, 356 *N.J.Super.* 468 (App. Div.), *certif. denied*, 176 *N.J.* 72 (2003).

IV. USE OF FORCE FOR THE PROTECTION OF OTHERS

A. Generally

Jury should be instructed, as to possession of a weapon for unlawful purposes, that defendant's honest but unreasonable belief that force was required to protect another negates the purposeful mental state to use the weapon unlawfully. *State v. Williams*, 168 *N.J.* 323 (2001).

VII. JURY INSTRUCTIONS

A. Generally

See State v. Simms, 369 *N.J.Super.* 466 (App. Div. 2004).

SELF-INCRIMINATION (*See also* **COURTS, EVIDENCE, IMMUNITY, JUVENILES, SIXTH AMENDMENT**)

I. CONSTITUTIONAL LIMITATIONS ON INTERROGATIONS

A. *Miranda* Generally

Defendant's spontaneous statements made after arrest and waiver of *Miranda* rights were inadmissible because he did not understand what was happening due to his cognitive deficit. *State v. Beckler*, 366 *N.J.Super.* 16 (App. Div.), *certif. denied*, 180 *N.J.* 151 (2004).

Defendant, properly extradited from another state via the Uniform Criminal Extradition Act and a voluntarily agreed-to informal waiver of extradition, validly confessed. *State v. Soto*, 340 *N.J.Super.* 47 (App. Div.), *certif. denied*, 170 *N.J.* 209 (2001).

See Hiibel v. Sixth Judicial D. Ct., Nev., 124 *S.Ct.* 2451 (2004).

B. When is a Defendant in Custody?

Interrogation occurring in a police-dominated atmosphere -- here, in a state psychiatric hospital -- unaccompanied by *Miranda* warnings, coupled with objective indications that defendant was a suspect and where his movements were circumscribed, meant that his statements were inadmissible. *State v. Stott*, 171 *N.J.* 343 (2002).

Although in custody, defendant's statements were admissible because he was never interrogated -- he initiated each and every encounter with the police in attempting to curry favor and improperly influence the officers. *State v. Cryan*, 363 *N.J.Super.* 442 (App. Div. 2003).

C. What Constitutes Interrogation?

Defendant, in attempting to obtain favorable treatment, initiated all statements with the police. Thus the officers were not obligated to advise him of his *Miranda* rights before responding to his unsolicited statements. *State v. Cryan*, 363 *N.J.Super.* 442 (App. Div. 2003).

D. The Public Safety Exception

Exception did not apply where defendant was in a motel room, no one had seen a gun, and a threat to shoot someone was remote in time and place. *State v. Stephenson*, 350 *N.J.Super.* 517 (App. Div. 2002). Also, the gun was not in a public place or accessible to the public. *Id.*

E. Adequacy of *Miranda* Warnings

Absent a showing of prejudice, failure to comply with the Vienna Convention will not result in reversal of a defendant's convictions. Here defendant, a South Korean illegal alien, had turned himself in to the police, had received *Miranda* rights in both English and Korean, and after waiving them and speaking to the police then invoked his right to silence. *State v. Jang*, 359 *N.J.Super.* 85 (App. Div.), *certif. denied*, 177 *N.J.* 492 (2003); *see State v. Homdziuk*, 369 *N.J.Super.* 279 (App. Div. 2004) (German citizen given *Miranda* rights in his native language).

F. Waiver

The State may properly questioned a suspect, without defense counsel's consent, after a criminal complaint has been filed or an arrest warrant has issued but before an indictment has been returned. *State v. A.G.D.*, 178 *N.J.* 56 (2003). Also, a suspect's waiver of their self-incrimination right is not valid if the police do not inform them that a complaint or warrant has been obtained. *Id.*

G. Invocations and Their Consequences

Statements elicited after invocation of a *Miranda* right -- defendant asked if he could "say something off the record" and officers agreed to listen -- was a violation of constitutional dimension that rendered the statement involuntary. *State v. Pillar*, 359 *N.J.Super.* 249 (App. Div.), *certif. denied*, 177 *N.J.* 572 (2003).

Statements are inadmissible if, prior to their elicitation, defendant tells the police he or she does not wish to give them. *State v. Shelton*, 344 *N.J.Super.* 505 (App. Div. 2001), *certif. denied*, 171 *N.J.* 43 (2002). The police cannot ask a defendant to "clarify" his or her invocation of the right not to give a statement, but error was harmless given defendant's prior consistent oral statement that was properly admitted. *Id.*

I. *Miranda* Violations and Taint

Constitutional *Miranda* violation triggers the "contribution" (whether the error contributed to the verdict) harmless error test. *State v. Pillar*, 359 *N.J.Super.* 249 (App. Div.), *certif. denied*, 177 *N.J.* 572 (2003).

The fruit of the poisonous tree doctrine does not apply to derivative evidence obtained as a result of a voluntary, but inadmissible, statement given before *Miranda* warnings were issued. *United States v. DeSumma*, 272 *F.*3d 176, 180 (3d Cir. 2001), *cert. denied*, 535 U.S. 1028 (2002).

J. Suppressed Statements Used for Impeachment Purposes

While taped messages defendant left on victim's answering machine were correctly ruled admissible to impeach her credibility if she testified inconsistently with them at trial, the trial court must determine if they and written statements she had made were given voluntarily because defendant claimed that the victim had coerced them. *State v. Marczak*, 344 *N.J.Super.* 388 (App. Div. 2001) (relying on *State v. Kelly*, 61 *N.J.* 283 (1972)), *certif. denied*, 171 *N.J.* 44 (2002). If on remand the statements were deemed voluntary her convictions would stand, but she was entitled to a new trial if they were not. *Id.*

K. Juveniles and *Miranda*

Juvenile validly waived his rights in his mother's presence and thereafter confessed outside her presence while she watched through a one-way mirror/window. *State v. Q.N.*, 179 *N.J.* 165 (2004).

Juveniles not subject to custodial interrogation have no right to parental involvement when giving statements. *State in re J.D.H.*, 171 *N.J.* 475 (2002).

N. Procedural Issues Relating to Confessions

The state due process clause does not require that police electronically record custodial interrogations as a precondition to admissibility. *State v. Cook*, 179 *N.J.* 533 (2004). Such recording would benefit the criminal justice system, however, and a committee would be established to study the issue. *Id.*

As to the preservation of rights to appeal the admissibility of statements after a guilty plea, see *State v. Diloreto*, 362 *N.J.Super.* 600 (App. Div. 2003) (discussing *R.* 3:5-7(d) and *R.* 3:9-3(f)), *aff'd o.g.* 180 *N.J.* 264 (2004).

O. Trickery

Police may not fabricate tangible evidence -- here, an officer posing as an eyewitness was "interviewed" on an audiotape --, show that evidence to defendant and elicit a confession, and use the fabricated evidence at trial to support the voluntariness of the confession. *State v. Patton*, 362 *N.J.Super.* 16 (App. Div.), *certif. denied*, 178 *N.J.* 35 (2003). Although police may misrepresent facts or suggest that other evidence exists that implicates defendant, they may not fabricate tangible evidence to induce a confession. Also, here the fictitious audiotape contained hearsay of defendant's prior bad acts and violated his due process right, rendering his confession *per se* inadmissible. *Id.*

P. Length of Interrogation

The length of interrogation alone may render a confession *per se* involuntary and violate due process. *State v. Knight*, 369 *N.J.Super.* 424 (App. Div.), *certif. granted*, 181 *N.J.* 547 (2004).

II. THE PRIVILEGE AGAINST SELF-INCRIMINATION

A. General Principles

Privilege had not expired during defendant's sex offender treatment process because his direct appeal was not final until his petition for certification was denied. *Lewis v. Department of Corr.*, 365 *N.J.Super.* 503 (App. Div. 2004).

D. Self-Incrimination and Trial Witnesses

The State did not use defendant's pretrial silence to impeach a defense witness; that witness failed to come forward when it was natural to have done so, and the defense never objected. *State v. Holden*, 364 *N.J.Super.* 504 (App. Div. 2003).

SENTENCING (*See also* **GUILTY PLEAS AND PLEA BARGAINING, INTENSIVE SUPERVISION PROGRAM, MERGER, PRISONERS AND PAROLE, PROBATION, RESTITUTION, SEXUAL OFFENSES AND OFFENDERS**)

I. FACTORS TO BE CONSIDERED AT SENTENCING

A. Aggravating Factors

1. Generally

Trial court inappropriately considered an "aggravating factor" not found in *N.J.S.A.* 2C:44-1a. *State v. Thomas,* 356 *N.J.Super.* 299 (App. Div. 2002).

B. Mitigating Factors

The consideration of mitigating factors is discretionary. *State v. Malik*, 365 *N.J.Super.* 267 (App. Div. 2003), *certif. denied*, 180 *N.J.* 354 (2004).

2. Youth - *N.J.S.A.* 2C:44-1b

Youth itself is not a statutory mitigating factor unless defendant was substantially influenced by a more mature person. *State v. Halsey*, 340 *N.J.Super.* 492 (App. Div. 2001), *certif. denied*, 171 *N.J.* 443 (2002).

7. Excessive Hardship - *N.J.S.A.* 2C:44-1b(11)

Family's reliance on defendant for support was not dispositive "since any number of criminal defendants have family members who rely upon them." *State v. Evers*, 368 *N.J.Super.* 151 (App. Div. 2004).

9. Codefendant's Sentences (Disparity)

Defendant with consecutive life sentences for two felony murders was entitled to concurrent terms because another judge had sentenced a codefendant to concurrent terms for the same murders. *State v. Roach*, 167 *N.J.* 565 (2001).

II. PRESUMPTION OF IMPRISONMENT - *N.J.S.A.* 2C:44-1d

Off-duty police officer who provided Ecstacy pills to another to sell would not suffer a "serious injustice" by imprisonment. *State v. Corso*, 355 *N.J.Super.* 518 (App. Div. 2002), *certif. denied*, 175 *N.J.* 547 (2003). Defendant therefore was not entitled to a probationary term for committing second degree official misconduct. *Id.*

V. DOWNGRADE OF SENTENCE - *N.J.S.A.* 2C:44-1f(2)

Trial court abused its discretion in imposing a probationary term for second degree sexual assault. *State v. Cooke*, 345 *N.J.Super.* 480 (App. Div. 2001), *certif. denied*, 171 *N.J.* 340 (2002). A

disagreement with the jury verdict cannot justify probation for a second degree crime under the "serious injustice" exception. *Id.*

See State v. Evers, 175 *N.J.* 355 (2003) (no probation for second degree distribution of child pornography); *State v. Lebra*, 357 *N.J.Super.* 500 (App. Div. 2003) (no probation for second degree vehicular homicide).

VI. INDETERMINATE SENTENCES FOR YOUTHFUL OFFENDERS

Defendant not entitled to young adult offender sentencing for vehicular homicide conviction because he never applied for it and because such sentencing cannot be imposed for NERA crimes. *State v. Corriero*, 357 *N.J.Super.* 214 (App. Div. 2003).

VIII. CONCURRENT AND CONSECUTIVE TERMS

A. Generally

See State v. Marinez, 370 *N.J.Super.* 49 (App. Div. 2004).

B. *Yarbough* Guidelines

The "multiple victim" factor of the *Yarbough* criteria is entitled to great weight and can itself support consecutive terms in a case where a drunk driver kills or seriously injures more than one victim. *State v. Carey*, 168 *N.J.* 413 (2001); *State v. Molina*, 168 *N.J.* 436 (2001). Cases involving multiple victims should ordinarily result in at least two consecutive sentences. *Id.*

Yarbough constitutes a qualitative, not a quantitative, approach to consecutive sentencing. *State v. Ellis*, 346 *N.J.Super.* 583 (App. Div.), *aff'd o.b.* 174 *N.J.* 535 (2002). A trial judge ordering defendant to first serve a less-restrictive term before a more-restrictive one should place on the record the specific consequences of such sentences. *Id.*

C. One Incident

Consecutive sentences were proper for defendant's murder of one victim and attempted murder of the other. *State v. Jang*, 359 *N.J.Super.* 85 (App. Div.), *certif. denied*, 177 *N.J.* 492 (2003).

IX. MANDATORY SENTENCES

B. Graves Act

Imposing a Graves Act sentence does not violate *State v. Johnson*, 166 *N.J.* 523 (2001), and defendant, convicted of first degree robbery as an accomplice, knew his codefendants had guns both before and after the robbery where he was the getaway driver. *State v. Figueroa*, 358 *N.J.Super.* 317 (App. Div. 2003).

Trial courts can decide that a defendant intended to use a gun against another because *McMillan v. Pennsylvania*, 477 *U.S.* 79 (1986), was good law after *Apprendi v. New Jersey*, 530 *U.S.* 466 (2000). *State v. Watson*, 346 *N.J.Super.* 521 (App. Div. 2002), *certif. denied*, 176 *N.J.* 278 (2003). Thus *N.J.S.A.* 2C:43-6d was valid even after *State v. Johnson*, 166 *N.J.* 523 (2001), although trial courts should try all Graves Act cases as if *Johnson* applied until the Supreme Court of New Jersey decides the issue. *Id.*

See State v. Perez, 348 *N.J.Super.* 322 (App. Div.) (Act applies to inoperable firearms), *certif. denied*, 174 *N.J.* 192 (2002).

C. Graves Act Extended Term - *N.J.S.A.* 2C:43-6c; *N.J.S.A.* 2C:44-3

Extended Graves Act sentence is not triggered by a carjacking conviction. *State v. Livingston*, 340 *N.J.Super.* 133 (App. Div.), *aff'd o.g.* 172 *N.J.* 209 (2002).

D. NERA (No Early Release Act) - *N.J.S.A.* 2C:43-7.2 (effective June 9, 1997)

See State v. Meekins, 180 *N.J.* 321 (2004) (holding that only a NERA term at least equal to that applicable to a maximum ordinary term for the degree of crime involved can be imposed on a pre-amendment NERA extended term); *see also State v. Andino*, 345 *N.J.Super.* 35 (App. Div. 2001); *State v. Allen*, 337 *N.J.Super.* 259 (App. Div. 2001), *certif. denied*, 171 *N.J.* 43 (2002). *See State v. Berardi*, 369 *N.J.Super.* 445 (App. Div. 2004).

2. Violent Crime

An equally divided Supreme Court let stand the Appellate Division's decision that NERA does not apply to murder convictions. *State v. Manzie*, 168 *N.J.* 113, *reh'g denied*, ___ *N.J.* ___ (2001); *see State v. Arenas*, 363 *N.J.Super.* 1 (App. Div. 2003) (no NERA for felony murder conviction), *certif. denied*, 178 *N.J.* 452 (2004); *State v. Burris,* 357 *N.J.Super.* 326 (App Div. 2002), *certif. denied,* 176 *N.J.* 279 (2003); *State v. Chavies,* 345 *N.J.Super.* 254 (App. Div. 2001) (if defendant convicted of murder on retrial,

Manzie applies). *Manzie*, though, is not of precedential value and does not bind lower courts.

The Court in *State v. Jarrells*, 181 *N.J.* 538 (2004), agreed with the decisions in *State v. Wade*, 169 *N.J.* 302 (2001), and *State v. Ferencsik*, 326 *N.J.Super.* 228 (App. Div. 1999), holding that NERA applied to vehicular homicide convictions.

A NERA sentence is not applicable where the jury's second degree aggravated assault verdict did not identify if defendant caused, or only attempted to cause, serious bodily injury, or that use of a deadly weapon was a predicate of the conviction. *State v. Natale*, 348 *N.J.Super.* 625 (App. Div. 2002), *aff'd per curiam*, 178 *N.J.* 51 (2003).

Defendant's armed robbery conviction was a violent crime carrying with it a mandatory period of parole ineligibility, and prevented his request for reconsideration of sentence to enter a drug treatment facility during service of the parole disqualifier. *State v. Le,* 354 *N.J.Super.* 91 (Law Div. 2002).

3. Deadly Weapon

Pre-amendment NERA definition of "deadly weapon" requires a judicial finding that the weapon -- here, a stun gun -- was, in the manner it was used or intended to be used, known to be capable of producing death or serious bodily injury. *State v. Wood,* 361 *N.J.Super.* 427 (App. Div. 2003). The matter was remanded to the trial court to permit the State to present evidence that the particular stun gun used fit this definition. *Id.*

NERA applies to second degree possession of a weapon for unlawful purposes, and the amended NERA statute excluding this offense does not apply retroactively. *State v. Parolin*, 171 *N.J.* 223 (2002).

NERA is applicable to an aggravated assault conviction where defendant used a razor or box cutter. *State v. McLean*, 344 *N.J.Super.* 61 (App. Div. 2001), *certif. denied*, 172 *N.J.* 179 (2002).

NERA is applicable to armed robbery with an unloaded but operable handgun. *State v. Jules*, 345 *N.J.Super.* 185 (App. Div. 2001) (overruling *State v. Spahle*, 343 *N.J.Super.* 149 (Law Div. 2001)), *certif. denied*, 171 *N.J.* 337 (2002).

NERA is not factually applicable to second degree aggravated assault merely because the jury convicted defendant of third degree aggravated assault using a deadly weapon. *State v. Natale*, 348 *N.J.Super.* 625 (App. Div. 2002), *aff'd per curiam*, 178 *N.J.* 51 (2003). Also, NERA does not apply to an inoperable firearm. *State v. Perez*, 348 *N.J.Super.* 322 (App. Div.), *certif. denied*, 174 *N.J.* 192 (2002).

4. NERA Hearing and Sentence

See State v. Marinez, 370 *N.J.Super.* 49 (App. Div. 2004) (Appellate Division modified legal NERA term it considered harsh).

E. Three Strikes - *N.J.S.A.* 2C:43-7.1

N.J.S.A. 2C:43-7.1 does not require that a defendant's first 2 convictions be entered before he or she commits the third predicate act. *State v. Galiano*, 349 *N.J.Super.* 157 (App. Div. 2002), *certif. denied*, 178 *N.J.* 375 (2003). The reasoning as to the order of Three Strikes convictions tracks the logic of the Graves Act and persistent offender case law. *Id.*

Defendant not convicted "on two or more prior and separate occasions" if sentenced on the same day for separate robberies. *See State v. Livingston*, 172 *N.J.* 209 (2002).

F. Assault Firearm - *N.J.S.A.* 2C:43-6g

Factual determination of whether a firearm is an "assault firearm," for purposes of *N.J.S.A.* 2C:43-6g, must be made by a jury beyond a reasonable doubt to impose the mandatory parole disqualifier. *State v. Petrucci*, 343 *N.J.Super.* 536 (App. Div. 2001), *certif. granted & remanded*, 176 *N.J.* 277 (2003). On remand the Appellate Division reversed defendant's mandatory 10 year sentence with a 10 year parole disqualifier, determining that a finding that he possessed an assault firearm while committing a specified offense increased the maximum penalty for that second degree crime. *State v. Petrucci*, 365 *N.J.Super.* 454 (App. Div.), *certif. denied*, 179 *N.J.* 373 (2004). A jury had to make this finding because it required that defendant serve the entire term. *Id.*

G. Vehicular Homicide While Driving Drunk - *N.J.S.A.* 2C:11-5b(1)

Statute requires one-third to one-half parole disqualifier or three years, whichever is greater, for defendants committing vehicular homicide while driving drunk. *State v. Stanton,* 176 *N.J.*

75, *cert. denied*, 540 *U.S.* 903 (2003). The trial judge makes the drunk driving determination by a preponderance of the evidence; such a finding is not as to an element of the crime pursuant to *N.J.S.A.* 2C:1-14h or *Harris v. United States,* 536 *U.S.* 545 (2002), and drunk driving is a "mere circumstance" in determining defendant's recklessness. *Id.*

X. DISCRETIONARY EXTENDED TERMS - *N.J.S.A.* 2C:44-3

A. Persistent Offender

Apprendi does not require a jury finding of factors permitting persistent offender extended terms. *State v. Dixon*, 346 *N.J.Super.* 126 (App. Div. 2001), *certif. denied*, 172 *N.J.* 181 (2002).

Trial court may only impose one discretionary extended term. *State v. Denmon*, 347 *N.J.Super.* 457 (App. Div.), *certif. denied*, 174 *N.J.* 41 (2002).

See State v. Murray, 338 *N.J.Super.* 80 (App. Div.), *certif. denied*, 169 *N.J.* 608 (2001).

XI. PROBATION - *N.J.S.A.* 2C:45-3 and 4

The filing of an arrest warrant "commences" violation of probation proceedings pursuant to *N.J.S.A.* 2C:45-3c. *State v. Nellom*, 178 *N.J.* 192 (2003).

XII. SENTENCING ON PROBATION VIOLATIONS

Although incarceration can be imposed on a defendant for inexcusably failing to comply with conditions of probation, it cannot result solely from her status as a pregnant drug addict as a way of protecting the fetus. *State v. Ikerd*, 369 *N.J.Super.* 610 (App. Div. 2004).

XIII. RESTITUTION, FINES, AND VCCB PENALTIES

A. Restitution

See State v. Jones, 347 *N.J.Super.* 150 (App. Div.) (*N.J.S.A.* 2C:43-2.1 mandates payment of restitution to owner of stolen car regardless of defendant's ability to pay), *certif. denied*, 172 *N.J.* 181 (2002).

B. Fines

See State v. El Moghrabi, 341 *N.J.Super.* 354 (App. Div.), *certif. denied*, 169 *N.J.* 610 (2001).

XIV. STATE'S RIGHT TO APPEAL - *N.J.S.A.* 2C:44-1f(2) (*See also* **APPEALS**)

See State v. Evers, 368 *N.J.Super.* 159 (App. Div. 2004); *State v. Gould*, 352 *N.J.Super.* 313 (App. Div. 2002) (failure to appeal from resentencing, and defendant's commencement of serving his sentence, barred State's appeal under *N.J.S.A.* 2C:44-1f(2)); *State v. Livingston*, 340 *N.J.Super.* 133 (App. Div. 2001), *aff'd o.g.* 172 *N.J.* 209, 215 (2002).

XVI. CONFLICT BETWEEN ORAL SENTENCE AND JUDGMENT OF CONVICTION

See State v. Murray, 338 *N.J.Super.* 80 (App. Div.), *certif. denied*, 169 *N.J.* 608 (2001).

XVII. ILLEGAL SENTENCES

Parties cannot negotiate an illegal sentence. *State v. Smith*, ___ *N.J.Super.* ___ (App. Div. 2004).

XVIII. CREDIT FOR TIME SERVED

A. Jail Credit

Pursuant to *R.* 3:21-8, defendants are not entitled to jail credit for time spent on probation before they begin serving their custodial sentences. *State v. Evers*, 368 *N.J.Super.* 159 (App. Div. 2004).

Defendant's commutation credits could not be removed because he failed to fully cooperate with sex offender treatment. *Lewis v. Department of Corr.*, 365 *N.J.Super.* 503 (App. Div. 2004).

B. Gap-Time Credits - *N.J.S.A.* 2C:44-5b(2)

Juveniles are entitled to gap-time credit. *State v. Franklin*, 175 *N.J.* 456 (2003).

Defendants get no gap-time credit for time spent in New Jersey on an out-of-state sentence. *State v. Carreker*, 172 *N.J.* 100 (2002) (overruling *State v. McIntosh*, 346 *N.J.Super.* 1 (App. Div. 2001), and *State v. Dela Rosa*, 327 *N.J.Super.* 295 (App. Div.), *certif. denied*, 164 *N.J.* 191 (2000)).

Defendants do not get gap-time credit applied against their period of parole ineligibility imposed pursuant to NERA. *Meyer v. New Jersey State Parole Bd.*, 345 *N.J.Super.* 424 (App. Div. 2001), *certif. denied*, 171 *N.J.* 339 (2002).

Defendant was entitled to gap-time credit for 2 prior imprisonments for other crimes even though they covered the time his own conduct in hiding a body prevented the State from

knowing that a crime had been committed at all. *State v. Ruiz,* 355 *N.J.Super.* 237 (Law Div. 2003).

XIX. MODIFICATION OR REDUCTION OF SENTENCE

A. Release Because of Illness or Infirmity

2. Release to a Drug or Alcohol Treatment Program

Second degree offenders are eligible for such programs pursuant to *N.J.S.A.* 2C:35-14. *State v. N.I.*, 349 *N.J.Super.* 299 (App. Div. 2002).

Defendant utterly failed to provide any support for his claim that he was an alcoholic and should be resentenced to a drug treatment facility during service of his 85% NERA period of parole ineligibility for armed robbery. *State v. Le,* 354 *N.J.Super.* 91 (Law Div. 2002).

B. Release Because of a Change in the Law

The Legislature knows how to make a more lenient sentencing provision applicable to existing convictions. In creating a new offense rather than reducing the maximum sentence for an existing crime, the Legislature did not provide a basis for a convicted defendant to modify or reduce his or her sentence pursuant to *R.* 3:21-10. *State v. James*, 343 *N.J.Super.* 143 (App. Div. 2001).

XX. INCREASE OF SENTENCE ON RESENTENCING (*See also* **DOUBLE JEOPARDY**)

See State v. Evers, 368 *N.J. Super.* 159 (App. Div. 2004) (no double jeopardy preclusion).

XXII. SEX OFFENDER SENTENCING

Defendants pleading guilty to sexually violent offenses must, as a matter of fundamental fairness, be informed of the collateral possibility of civil commitment pursuant to the Sexually Violent Predator Act. *State v. Bellamy*, 178 *N.J.* 127 (2003).

State failed to submit adequate, admissible evidence to compel appellant's civil commitment under the Sexually Violent Predator Act. *In re Civil Commitment of G.G.N.*, 372 *N.J.Super.* 42 (App. Div. 2004). "[T]here is a tipping point where due process is violated by the use of hearsay." *Id.*

Juvenile adjudicated delinquent for an offense which, if committed by an adult, would constitute criminal sexual contact, was subject to Megan's Law registration and notification because his victim was 17 years old. *State in re J.P.F.*, 368 *N.J.Super.* 24 (App. Div.), *certif. denied*, 180 *N.J.* 453 (2004).

A jury need not determine beyond a reasonable doubt the findings necessary to trigger commitment to Avenel. *State v. Luckey*, 366 *N.J.Super.* 79 (App. Div. 2004).

Remand for resentencing on defendant's fourth degree sex crime was necessary because, while *N.J.S.A.* 2C:43-6.4e(1) mandates an extended term for repeat offenders committing such fourth degree crimes, *N.J.S.A.* 2C:43-7 provides no parameters for the length of those extended terms. *State v. Olsvary,* 357 *N.J.Super.* 206 (App. Div.), *certif. denied*, 177 *N.J.* 222 (2003).

See State v. Jamgochian, 363 *N.J.Super.* 220 (App. Div. 2003) (defendants to know the effect of community supervision for life when pleading guilty to sex offenses); *State v. Bond*, 365 *N.J.Super.* 430 (App. Div. 2003) (defendant had notice of community supervision for life conditions).

XXIII. SUSPENDED SENTENCES - *N.J.S.A.* 2C:43-2b, 45-1 and 2

Material violation of the suspension of the sentence's terms can result in imprisonment, and guidelines for sentencing upon a revocation are the same as those applied to violations of probation. *State v. Cullen*, 351 *N.J.Super.* 505 (App. Div. 2002).

XXIV. APPLICATION OF *Blakely v. Washington*, 124 *S.Ct.* 2531 (2004)

A. *Blakely*

"[T]he maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant" is the statutory maximum for *Apprendi* purposes. *Blakely v. Washington*, 124 *S.Ct.* 2531, 2537 (2004). Thus defendant could not be sentenced to more than the statutory maximum term of the standard range based upon the trial court's determination that he had acted with deliberate cruelty. *Id.*

Consecutive maximum terms with periods of parole ineligibility did not violate *Blakely*. *State v. Abdullah*, 372 *N.J.Super.* 252 (App. Div. 2004). Aggravating factors 3, 6 and 9 are

offender-based, and fall within the recidivism exception in *Blakely*. *Id.* *See also State v. King,* 372 *N.J.Super.* 227 (App. Div. 2004).

SEXUAL OFFENSES AND OFFENDERS (*See also* **OBSCENITY, PROSTITUTION AND RELATED OFFENSES**)

II. TYPES OF SEXUAL OFFENSES

B. Aggravated Sexual Assault

As to aggravated sexual assault by a person with supervisory power or in a supervisory position pursuant to *N.J.S.A.* 2C:14-2a(2)(b), see *State v. Buscham*, 360 *N.J.Super.* 346 (App. Div. 2003).

C. Sexual Assault

See State v. VanDyke, 361 *N.J.Super.* 403 (App. Div.), *certif. denied*, 178 *N.J.* 35 (2003). Defendant committed aggravated sexual assault by telephoning a child, pretending to be a doctor, and instructing her to penetrate herself and then describe it to him. *State v. Maxwell*, 361 *N.J.Super.* 502 (Law Div. 2001), *aff'd*, 361 *N.J.Super.* 401 (App. Div.), *certif. denied*, 178 *N.J.* 34 (2003). The definition of "sexual penetration" in *N.J.S.A.* 2C:14-1b and c clearly contemplated insertion of a hand, finger, or object of a person other than the actor. *Id.*

E. Criminal Sexual Contact

See State v. Bellamy, 178 *N.J.* 127 (2003).

III. RELATED OFFENSES (*See* **ENDANGERING THE WELFARE OF CHILDREN**)

Defendant committed attempted endangering where the jury could reasonably conclude beyond a reasonable doubt that his purpose was to engage in a prohibited sexual offense with the child victim, and his actions constituted a substantial step towards effectuating those intentions. *State v. Perez*, 177 *N.J.* 540 (2003).

See State v. VanDyke, 361 *N.J.Super.* 403 (App. Div.), *certif. denied*, 178 *N.J.* 35 (2003).

V. EVIDENCE

B. Admissibility of Evidence (*See also* **EVIDENCE**)

See State v. VanDyke, 361 *N.J.Super.* 403 (App. Div.) (access to child victim's school records), *certif. denied*, 178 *N.J.* 35 (2003); *State v. L.P.*, 338 *N.J.Super.* 227 (App. Div.) (CSAAS), *certif. denied*, 170 *N.J.* 205 (2001).

See State v. Garron, 177 *N.J.*147 (2003) (rape shield statute interpreted to allow past conduct where evidence relevant to the defense has probative value outweighing its prejudicial effect), *cert. denied*, 124 *S.Ct.* 1169 (2004); *State v. Peterson*, 364 *N.J.Super.* 387 (App. Div. 2003) (test for gaining DNA testing pursuant to *N.J.S.A.* 2A:84A-32a); *State* v. *Burke,* 354 *N.J.Super.* 97 (Law Div. 2002) (State cannot employ rape shield statute to offer evidence of victim's virginity in its case-in-chief).

VI. SENTENCING (*See also* **SENTENCING**)

B. Sentence and Punishment

1. In General

It is constitutionally important to distinguish a dangerous sexual offender subject to civil commitment from other dangerous individuals more properly dealt with exclusively through criminal proceedings. *Kansas v. Crane*, 534 *U.S.* 407 (2002). This distinction prevents civil commitment from becoming a mechanism for retribution or general deterrence. *Id.*

See State v. Bellamy, 178 *N.J.* 127 (2003) (fundamental fairness required that defendants pleading guilty to sexually violent offenses be informed of the collateral consequence of possible commitment pursuant to the Sexually Violent Predator Act); *State v. Evers*, 368 *N.J.Super.* 159 (App. Div. 2004); *State v. Bond*, 365 *N.J.Super.* 430 (App. Div. 2003) (defendant notified of community supervision for life conditions, and that violating such a condition without good cause constituted a crime); *State v. Olsvary,* 357 *N.J.Super.* 206 (App. Div.) (as to extended term for fourth degree sex crime), *certif. denied*, 177 *N.J.* 222 (2003).

2. Avenel

The State need not prove to a jury beyond a reasonable doubt the findings necessary to commit a defendant to Avenel. *State v. Luckey*, 366 *N.J.Super.* 79 (App. Div. 2004).

VII. MEGAN'S LAW

B. Constitutionality

See Smith v. Doe, 538 *U.S.* 84 (2003) (Alaska sex offender registration law did not impose retroactive punishment in violation of *ex post facto*, and state legislature intended to enact a civil regulatory scheme to protect the public).

Megan's Law, as applied to juveniles, does not violate due process, equal protection, or freedom of movement. *In re J.G.*, 169 *N.J.* 304 (2001).

Convicted sex offenders must be included in the Internet Registry, and their right to privacy in their home addresses gives way to the State's compelling interest in preventing sex offenses in a mobile society. *A.A. v. New Jersey*, 341 *F.*3d 206 (3d Cir. 2003). Registry created no *ex post facto* or double jeopardy violation, and its purpose was to inform the public for its own safety and not to humiliate the offender. *Id.*

C. Case Law

Juveniles are subject to Megan's Law registration and notification. *State in re J.P.F.*, 368 *N.J.Super.* 24 (App. Div.), *certif. denied*, 180 *N.J.* 453 (2004).

Failure to pay VCCB assessment as of effective date of Megan's Law did not subject defendant to "other form of community supervision" requiring him to register pursuant to *N.J.S.A.* 2C:7-2b. *State v. S.R.,* 175 *N.J.* 23 (2002).

In determining the scope of the notification under the Registration and Community Notification Law (RCNL) for Tier Two offenders, the State, absent limiting circumstances, need not show that registrants are personally likely to appear at a particular location to notify schools and community organizations within the geographic scope of notification. *In re M.F.*, 169 *N.J.* 45 (2001). The RCNL also is constitutional as applied to juveniles who commit sex offenses, and those under age 14 when they committed their offenses may move to terminate registration and notification requirements when they turn 18. *In re J.G.*, 169 *N.J.* 304 (2001).

When a registrant moves and renotification occurs, the court must consider the recidivism risk in terms of the variable factors in the current situation. *In re H.M.*, 343 *N.J.Super.* 219 (App. Div. 2001).

Community supervision for life is a penal, not a collateral, consequence of a guilty plea of which defendant must be made aware. *State v. Jamgochian*, 363 *N.J.Super.* 220 (App. Div. 2003).

In *In re Registrant M.A.S.*, 344 *N.J.Super.* 596 (App. Div. 2001), the Appellate Division held that the "duration of offensive behavior" criterion of the RRAS reflected the belief that the longer the interval during which the diseased impulses fester the greater the danger the registrant will act out in the future. Thus the risk of reoffense was high for M.A.S. because more than 5 years had passed between his prior offense and his present crime. *Id.*

SIXTH AMENDMENT

I. RIGHT TO COUNSEL

A. Origin

The right to counsel is afforded because of the effect it has on the ability of the accused to receive a fair trial. *Mickens v. Taylor*, 535 *U.S.* 162 (2002); *see Marshall v. Hendricks*, 313 *F.Supp.*2d 423 (D.N.J. 2004).

Sixth Amendment right to counsel is offense-specific, and does not extend to crimes "factually related" to charged offenses unless they are the "same offense" under *Blockburger*. *Texas v. Cobb*, 532 *U.S.* 162 (2001).

B. Choice of Counsel

Right to counsel of choice does not trump an actual conflict of interest. *State in re S.G.*, 175 *N.J.* 132 (2003).

C. Effectiveness and Competence of Counsel

See Yarborough v. Gentry, 540 *U.S.* 1 (2003); *Wiggins v. Smith*, 539 *U.S.* 510 (2003); *Bell v. Cone*, 535 *U.S.* 685 (2002); *Mickens v. Taylor*, 535 *U.S.* 162 (2002); *Glover v. United States*, 531 *U.S.* 198 (2001); *Marshall v. Hendricks*, 313 *F.Supp.*2d 423 (D.N.J. 2004); Appel *v. Horn*, 250 *F.*3d 203 (3d Cir. 2001); *State v. Chew*, 179 *N.J.* 186 (2004) (penalty phase counsel in capital prosecution was ineffective for not calling a psychiatrist to provide evidence as to *N.J.S.A.* 2C:11-3c(5)(a)); *State v. DiFrisco*, 174 *N.J.* 195 (2002) (penalty phase counsel in capital prosecution not proven to be ineffective), *cert. denied*, 537 *U.S.* 1220 (2003).

Trial counsel was not ineffective for not objecting to the trial court's instruction that no one could enter or leave the courtroom while a traumatized child testified in defendant's sexual assault case. *State v. Cusumano*, 369 *N.J.Super.* 305 (App. Div.), *certif. denied*, 181 *N.J.* 546 (2004).

While trial counsel reasonably chose to have one expert witness testify rather than another, the failure to provide that expert with petitioner's statements to the police was error. *Affinito v. Hendricks*, 366 *F.*3d 252 (3d Cir. 2004). No prejudice existed, however, because the other expert's conclusion would have faced a similar attack. *Id.*

Trial counsel in capital case was ineffective for failing to investigate and present a mitigation case during the penalty phase. *Marshall v. Hendricks*, 313 *F.Supp.*2d 423 (D.N.J. 2004).

Defense counsel's failure to seek indictment's dismissal on double jeopardy grounds after improper grant of a mistrial constituted ineffective assistance of counsel. *State v. Allah*, 170 *N.J.* 269 (2002).

Trial counsel erred in not filing a motion to suppress evidence, betraying a lack of essential legal knowledge and prejudicing defendant. *State v. Johnson*, 365 *N.J.Super.* 27 (App. Div. 2003), *certif. denied*, 179 *N.J.* 372 (2004). Thus the matter was remanded to the trial court to conduct a suppression hearing. *Id.*

Trial counsel incorrectly advising defendant of his or her sentencing exposure if convicted at a trial, which prevents a fair evaluation of a plea offer and induces its rejection, constitutes remedial ineffective assistance. *State v. Taccetta*, 351 *N.J.Super.* 196 (App. Div.), *certif. denied,* 174 *N.J.* 544 (2002).

Defense counsel cannot agree to waive right to seek less than a particular sentence. *State v. Briggs*, 349 *N.J.Super.* 496 (App. Div. 2002). A plea agreement restriction to this effect deprived defendant of effective assistance of counsel. *Id.*

See State v. Homdziuk, 369 *N.J.Super.* 279 (App. Div. 2004) (regarding alleged Vienna Convention on Consular Rights violation).

D. Conflict of Interest

See State in re S.G., 175 *N.J.* 132 (2003).

E. Intrusion of Third Persons on the Right to Counsel

Police may not question an indicted defendant at his home absent counsel's presence or a waiver of counsel, regardless of whether "interrogation" was conducted. *Fellers v. United States*, 540 *U.S.* 519 (2004).

Trial court may not appoint *amicus* counsel to investigate and present any argument to waive an insanity defense and in favor of pursuing such a defense. *State v. Marut*, 361 *N.J.Super.* 431 (App. Div. 2003). *Amicus* counsel could not be afforded a confidential conversation with defendant because it could violate his privilege against self-incrimination to which the attorney-client privilege would not apply. *Id.*

F. Indigents (*See also* **COSTS**)

Sixth Amendment requires appointed counsel in any criminal prosecution resulting in "actual imprisonment," which includes imposition of a suspended sentence upon revocation of probation. *Alabama v. Shelton*, 535 *U.S.* 654 (2002).

G. Waiver of Right to Counsel and Participation with Counsel

The right to counsel attaches at the guilty plea entry -- a critical stage of the criminal process, and waiver of the right to counsel at a plea hearing must be knowing and intelligent (court to inform uncounselled defendants of the charges, the right to counsel regarding the plea, and the potential penal exposure). *Iowa v. Tovar*, 541 *U.S.* 77 (2004). Defendant need not be informed of the defenses to criminal charges that lay persons may not know or that waiving the right to counsel in pleading guilty risks overlooking a viable defense. *Id.*

Defendant representing himself *pro se* at trial was not required to be physically present at sidebars, so long as he was not deprived of meaningful participation in the contents of sidebars through standby counsel acting as a conduit. *State v. Davenport*, 177 *N.J.* 288 (2003). The jury was fully informed that defendant was representing himself and that counsel was acting as his legal advisor, and in the future trial courts should explore every avenue to ensure that defendants participate in sidebars to the fullest extent possible. *Id.*

Defendant should have been permitted to represent himself at trial because he timely asserted this right, his demeanor did not in anyway suggest that he might be disruptive while

representing himself, and he demonstrated a complete appreciation of the difficulties of self-representation, the nature and seriousness of the charges, and the potential consequences he faced. *State v. Thomas*, 362 *N.J.Super.* 229(App. Div.), *certif. denied*, 178 *N.J.* 249 (2003).
The courts cause structural error not subject to a harmless error analysis if they mistakenly deny defendant's request. *Id.*
Trial court correctly denied defendant's motion to proceed with trial *pro se*. *State v. Pessolano*, 343 *N.J.Super.* 464 (App. Div.), *certif. denied*, 170 *N.J.* 210 (2001).
See Cordova v. Baca, 346 *F.*3d 924 (9th Cir. 2003) (if petitioner did not validly waive right to counsel at trial, structural error exists requiring automatic reversal).

II. RIGHT TO A SPEEDY TRIAL

Defendant could assert denial of a speedy trial claim in post-conviction relief. *State v. Hammond*, 338 *N.J.Super.* 330 (App. Div.), *certif. denied*, 169 *N.J.* 609 (2001).
See State v. Gaikwad, 349 *N.J.Super.* 62 (App. Div. 2002).

B. The Four Factor Test for Determining Whether the Right to a Speedy Trial Has Been Violated
See State v. Fulford, 349 *N.J.Super.* 183 (App. Div. 2002) (State responsible for 32 month delay but defendant never asserted right to a speedy trial for nearly 2½ years and was not prejudiced).

G. Miscellaneous Examples
Two and a half year time period between arrest and trial did not deny defendant a speedy trial. *State v. May*, 362 *N.J.Super.* 572 (App. Div. 2003).
Three year and four month lapse of time between arrest and trial did not violate defendant's speedy trial right, nor did a three year lapse between sentencing and the filing of the appellate brief deny him a speedy appeal. *Douglas v. Hendricks*, 236 *F.Supp.*2d 412 (D.N.J. 2002).

III. RIGHT TO CONFRONTATION (*See also* **WITNESSES**)

A. Origin
Where defendant does not receive actual notice of the trial date, no inference of a waiver exists. *State v. Whaley*, 168 *N.J.* 94 (2001). This applies to adjourned trial dates, too. *State v. Smith*, 346 *N.J.Super.* 233 (App. Div. 2002).

B. Cross-Examination
Testimonial statements of witnesses absent from trial are only admissible if the declarant is unavailable and defendant has had a prior opportunity to cross-examine, overruling *Ohio v. Roberts*, 448 *U.S.* 56 (1980). *Crawford v. Washington*, 541 *U.S.* 36 (2004).
Trial judge erred in ruling that elderly victim could testify out of defendants' presence by way of videotaped deposition pursuant to *R.* 3:13-2. *State v. Benitez*, 360 *N.J.Super.* 101 (App. Div. 2003). State must provide medical evidence that witness suffers from a physical or mental incapacity. *Id.*
See State v. Rucki, 367 *N.J.Super.* 200 (App. Div. 2004) (prosecutor may not use guilty plea of a non-testifying accomplice to cross-examine defendant because it is inadmissible hearsay); *State v. Krivacska*, 341 *N.J.Super.* 1 (App. Div.) (child sexual assault victim testified at trial), *certif. denied*, 170 *N.J.* 206 (2001), *cert. denied*, 535 *U.S.* 1012 (2002).

E. Use of Hearsay and Expert Testimony
Defendant is deprived of confrontation right when a police officer repeats what a non-witness told him or her that identifies defendant as the perpetrator. *State v. Taylor*, 350 *N.J.Super.* 20 (App. Div.), *certif. denied*, 174 *N.J.* 190 (2002).
See State v. Rucki, 367 *N.J.Super.* 200 (App. Div. 2004).

VI. RIGHT TO A PUBLIC TRIAL

See State v. Cuccio, 350 *N.J.Super.* 248 (App. Div.) (trial court erred in excluding defendant's and victim's family members from the court room), *certif. denied*, 174 *N.J.* 43 (2002).

STALKING

See State v. Lozada, 357 *N.J.Super.* 468 (App. Div. 2003) (stalking and violation of domestic violence restraining order should be severed). Where the degree of the stalking offense is in question, the issue of whether there was stalking should be tried first without reference to any element -- *i.e.*, a restraining order -- that would elevate it to a third degree crime. If convicted, then defendant would stand trial before the same jury and face whatever additional proofs are necessary that would elevate the crime to third degree stalking. *Id.*

STATE CONSTITUTION

III. SEARCH AND SEIZURE LAW

A. Use of State Constitution in Search and Seizure Cases

See State v. Cleveland, 371 *N.J.Super.* 286 (App. Div. 2004).

STATUTE OF LIMITATIONS

Plaintiffs failed to state the elements necessary to maintain a cause of action for malicious prosecution, and therefore the statute of limitations was not tolled. *Freeman v. New Jersey*, 347 *N.J.Super.* 11 (App. Div.), *certif. denied*, 172 *N.J.* 178 (2002). Too, neither the discovery rules for racial profiling matters nor equitable tolling applied because plaintiffs were aware of the harm caused when searched. *Id.*

STATUTES AND ORDINANCES

I. GENERAL RULES OF STATUTORY CONSTRUCTION

A. Legislative Intent

For resisting arrest, the force defendant employs need not rise to the level of creating a substantial risk of causing injury to a police officer or another. *State v. Brannon*, 178 *N.J.* 500 (2004). The legislative purpose behind *N.J.S.A.* 2C:29-2a(3) is to avoid physical confrontation between arrestees, the police, and the public. *Id.*

See State v. Brooks, 366 *N.J.Super.* 447 (App. Div. 2004) (*N.J.S.A.* 2C:35-7.1 is neutral on its face, and was designed to protect the poor living in public housing from the rampant spread of drugs; neither its purpose nor effect was discriminatory).

B. Meaning of Statutory Language

The phrase "circumstances not manifestly appropriate" in *N.J.S.A.* 2C:39-5d contemplates not only a threat of harm to a person but also a threat of damage to property. *State in re G.C.*, 179 *N.J.* 475 (2004).

N.J.S.A. 2C:52-2c was clear and unambiguous regarding expungement of certain drug convictions, and the Appellate Division had no reason to look beyond the statute's literal terms to ascertain its meaning. *State v. P.L.,* 369 *N.J.Super.* 291 (App. Div. 2004). "[I]t is the court's duty to interpret a statute as written, not to legislate." *Id.*

The filing of an arrest warrant "commences" violation of probation proceedings pursuant to *N.J.S.A.* 2C:45-3c. *State v. Nellom*, 178 *N.J.* 192 (2003).

Legislature intended the term "reproduce" in *N.J.S.A.* 2C:24-4b(4) to require more than the printing of a preexisting image of child pornography for personal use. *State v. Sisler*, 177 *N.J.* 199 (2003).

See State v. Tarlowe, 370 *N.J.Super.* 224 (App. Div. 2004) (as to the meaning of *N.J.S.A.* 2C:21-4.3c).

G. The Preemption Doctrine and Statutory Construction

Federal preemption inapplicable where New Jersey and federal law are in harmony. *State v. Wahl*, 365 *N.J.Super.* 356 (App. Div. 2004).

Statute proscribing disorderly conduct (*N.J.S.A.* 2C:33-2) preempts municipal ordinance banning such conduct. *State v. Paserchia,* 356 *N.J.Super.* 461 (App. Div. 2003).

See State v. Stafford, 365 *N.J.Super.* 6 (App. Div. 2003) (federal law did not preempt township ordinances banning the feeding of migratory waterfowl).

H. Constitutional Analysis and Statutory Construction (*See also* ***FOURTEENTH AMENDMENT***)

All statutes are presumed constitutional. *State v. One 1990 Ford Thunderbird*, 371 *N.J.Super.* 228 (App. Div. 2004).

"Released unharmed" provision of the kidnapping statute was not vague. *State v. Sherman*, 367 *N.J.Super.* 324 (App. Div.), *certif. denied*, 180 *N.J.* 356 (2004).

Community supervision for life statute (*N.J.S.A.* 2C:43-6.4) did not violate the separation of powers by giving the Parole Board the authority to promulgate conditions in the Administrative Code. *State v. Bond*, 365 *N.J.Super.* 430 (App. Div. 2003).

Municipal ordinance (obstruction of public sidewalks) was unconstitutionally vague. *State v. Golin*, 363 *N.J.Super.* 474 (App. Div. 2003). Since it was essentially criminal in nature, the ordinance had to be strictly construed. *Id.*

Definition of "sexual penetration" in *N.J.S.A.* 2C:14-1c was not unconstitutionally vague on its face or as applied in a case where defendant telephoned young girls and engaged in

sexually explicit conversations with them, spoke of his desire to perform sexual acts on them and/or having them perform such acts on him, and on one occasion instructed a child to penetrate herself and then describe it to him. *State v. Maxwell*, 361 *N.J.Super.* 502 (Law Div. 2001), *aff'd*, 361 *N.J.Super.* 401 (App. Div.), *certif. denied*, 178 *N.J.* 34 (2003). Furthermore, *N.J.S.A.* 2C:24-4a was not unconstitutionally vague as applied to defendant because nothing required his physical presence to endanger children's welfare. *Id.*
See State v. Reiner, 180 *N.J.* 307 (2004) (interpreting *N.J.S.A.* 39:4-50(a) and (g) as separate DWI offenses).

STIPULATIONS (*See also* **POLYGRAPHS**)

I. TRIAL LEVEL

A. Generally

See State v. Wesner, 372 *N.J.Super.* 489 (App. Div. 2004) (on how to instruct the jury as to stipulations).

SUBPOENAS

II. THE POWER TO SUBPOENA

See State v. McAllister, 366 *N.J.Super.* 251 (App. Div.) (as to subpoenas *duces tecum*), *certif. granted*, 180 *N.J.* 151 (2004).

IV. SUBPOENA *DUCES TECUM*

A. Generally

See State v. McAllister, 366 *N.J.Super.* 251 (App. Div.) (for an individual's bank records), *certif. granted*, 180 *N.J.* 151 (2004).

THEFT

II. ELEMENTS

C. Theft by Deception

Fraud scheme between psychiatrist and school employees involving the filing of fake claims for treatments never received. *State v. Decree*, 343 *N.J.Super.* 410 (App. Div.), *certif. denied*, 170 *N.J.* 388 (2001).

D. Theft by Extortion

As to the territorial element of the offense and related jury instructions, see *State v. Casilla*, 362 *N.J.Super.* 554 (App. Div.), *certif. denied*, 178 *N.J.* 251 (2003).

E. Receiving and Fencing Stolen Property

To obtain a conviction for receiving stolen property pursuant to *N.J.S.A.* 2C:20-7a, the State must prove that the property in question was actually stolen. *State v. Hodde*, 181 *N.J.* 375 (2004).

G. Theft by Failure to Make a Required Disposition

In enacting Title 43 (unemployment compensation law), the Legislature did not intend to prohibit traditional criminal prosecution for theft of withheld unemployment or disability funds not paid over to the State. *State v. Pessolano*, 343 *N.J.Super.* 464 (App. Div.), *certif. denied*, 170 *N.J.* 210 (2001).

H. Unlawful Taking of a Means of Conveyance or Joyriding

See State v. Roberson, 356 *N.J.Super.* 332 (Law Div. 2002) (joyriding is not a lesser-included offense of theft because additional proofs are needed).

TRESPASS AND DAMAGING TANGIBLE PROPERTY

I. TRESPASS

A. Scope of the Offense

1. Elements of Criminal Trespass - *N.J.S.A.* 2C:18-3a

A "dwelling" includes a vacant apartment between rentals that is suitable for occupancy. *State v. Scott*, 169 *N.J.* 94 (2001).

2. Elements of Defiant Trespass - *N.J.S.A.* 2C:18-3b

Defiant trespass can be committed on a public road right-of-way in a suburban area that is not a public forum. *State v. Hamilton*, 368 *N.J.Super.* 151 (App. Div.), *certif. denied*, 181 *N.J.* 548 (2004).

3. Elements of Criminal Trepass - *N.J.S.A.* 2C:18-3c

The "peeping Tom" subsection of the criminal trepass statute required criminal intrusion into a dwelling from a vantage point outside that dwelling. *State v. Burke*, 362 *N.J.Super.* 55 (App. Div.), *certif. denied*, 178 *N.J.* 374 (2003). Defendant could not be

prosecuted under this subsection by secretly videotaping from inside his own residence two women showering and using his bathroom. *Id.*

4. Caselaw

Prosecution for defiant trespass pursuant to *N.J.S.A.* 2C:18-3b was appropriate where defendant disrupted a public meeting, was asked to leave, was told he would be arrested if he did not leave, and still ignored these official directives. *State v. Brennan*, 344 *N.J.Super.* 136 (App. Div. 2001), *certif. denied*, 171 *N.J.* 43 (2002).

VICTIM'S RIGHTS

III. VICTIM IMPACT STATEMENTS

In a capital case, family members may not testify about their opposition to the death penalty because victim-impact witnesses are prohibited from expressing their opinions as to an appropriate sentence. *State v. Koskovich*, 168 *N.J.* 448 (2001).

WEAPONS

I. DEFINITIONS - *N.J.S.A.* 2C:39-1

B. Firearms Generally

2. Method of Propulsion and Type of Projectile

Paintball gun satisfies *N.J.S.A.* 2C:39-1f. *State in re G.S.*, 179 *N.J.* 475 (2004).

H. No Early Release Act

NERA does not apply to inoperable firearms. *State v. Perez*, 348 *N.J.Super.* 322 (App. Div.), *certif. denied*, 174 *N.J.* 192 (2002).

II. PRESUMPTION AS TO POSSESSION, LICENSES AND PERMITS - *N.J.S.A.* 2C:39-2

B. Lack of License or Permits

State may not rely on the presumption in *N.J.S.A.* 2C:39-2b where defendant possessed a handgun permit in another state and testified that the guns were purchased in that state. *State v. Cuccio*, 350 *N.J.Super.* 248 (App. Div.), *certif. denied*, 174 *N.J.* 43 (2002).

IV. POSSESSION OF WEAPONS FOR UNLAWFUL PURPOSES - *N.J.S.A.* 2C:39-4

D. Jury Instructions

Charge needs to identify the specific unlawful purposes for which the weapon was possessed, and jury should be instructed that defendant's honest, though unreasonable, belief that force was required to protect another negates the crime's mental state of purpose to use the weapon unlawfully. *State v. Brims*, 168 *N.J.* 297 (2001); *State v. Williams*, 168 *N.J.* 323 (2001).

VI. SEQUESTRATION; *N.J.R.E.* 615

Trial courts may not sequester a juvenile's parents from his or her trial, even if they may be called as witnesses. *State in re V.M.*, 363 *N.J.Super.* 529 (App. Div. 2003).

VII. PERSONS PROHIBITED FROM HAVING WEAPONS - *N.J.S.A.* 2C:39-7

Defendants charged only with violating *N.J.S.A.* 2C:39-7 are not entitled to a bifurcated jury trial, and should be tried in a unitary trial with appropriate limiting instructions to reduce the risk of undue prejudice from evidence of the predicate conviction. *State v. Brown*, 180 *N.J.* 572 (2004).

See State v. Jones, 364 *N.J.Super.* 376 (App. Div. 2003) (trial court can change decision to bifurcate trial issues if defendant decides not to testify).

WIRETAPPING

VI. EXCEPTIONS TO UNLAWFUL ELECTRONIC SURVEILLANCES - *N.J.S.A.* 2A:156A-4

B. Exceptions

2. Police may lawfully intercept communications of juvenile suspects under the Act. *State in re J.D.H.*, 171 *N.J.* 475 (2002).

Prosecutor's office is not limited to appointing but one designee to authorize consensual intercepts pursuant to *N.J.S.A.* 2A:156A-4c. *State v. Toth*, 354 *N.J.Super.* 13 (App. Div. 2002).

WITNESSES (*See also* **EVIDENCE**, **IMMUNITY**)

I. CROSS-EXAMINATION

C. Impeachment with Extrinsic Evidence

The State may not cross-examine defendant with the guilty plea of a non-testifying accomplice because it is inadmissible hearsay. *State v. Rucki*, 367 *N.J.Super.* 200 (App. Div. 2004).

VII. AVAILABILITY AND RIGHT TO CONFRONT WITNESSES AND TO COMPULSORY PROCESS

See State v. Garron, 177 *N.J.* 147 (2003) (under constitutional analysis, rape shield evidence relevant to defense that has a probative value outweighing its prejudicial effect must be placed before the factfinder), *cert. denied*, 124 *S.Ct.* 1169 (2004); *State v. Benitez*, 360 *N.J.Super.* 101 (App. Div. 2003) (State bears heavy burden of proving, via medical evidence, that witness is unavailable to testify in court so as to admit their videotaped deposition pursuant to *R.* 3:13-2).

VIII. INFANTS

Children can testify despite some leading or suggestive interview techniques. *State v. Krivacska*, 341 *N.J.Super.* 1 (App. Div.), *certif. denied*, 170 *N.J.* 206 (2001), *cert. denied*, 535 *U.S.* 1012 (2002). The prosecutor may administer the oath to a child witness pursuant to *N.J.R.E.* 603, and the trial court properly allowed the child to take the stand with a support person next to her. The appellate court set forth several factors a trial judge should consider in permitting such a procedure. *State v. T.E.*, 342 *N.J.Super.* 14 (App. Div.), *certif. denied*, 170 *N.J.* 86 (2001).

X. EXPERT TESTIMONY

State expert could not testify because he failed to provide the defense with a reliable database that would permit a challenge to his conclusions. *State v. Fortin*, 178 *N.J.* 540 (2004).

Defendants do not have the right to the effective assistance of expert witnesses; this claim must be analyzed in terms of the effectiveness of counsel obtaining the experts. *State v. DiFrisco*, 174 *N.J.* 195 (2002), *cert. denied*, 537 *U.S.* 1220 (2003).

Expert cannot proffer inadmissible hearsay and opinions as to defendant's personality disorder and credibility. *State v. Vandeweaghe*, 177 *N.J.* 229 (2003).

Expert cannot offer a net opinion. *State v. Pavlik*, 363 *N.J.Super.* 307 (App. Div. 2003).

Proposed expert witness' testimony as to the credibility of defendant's confessions was not scientifically reliable, and the subject matter was not beyond the average juror's grasp. *State v. Free*, 351 *N.J.Super.* 203 (App. Div. 2002).

A police officer may testify as an expert witness regarding possession of drugs with intent to distribute. *State v. Summers*, 176 *N.J.* 306 (2003).

Accident reconstruction expert can testify as to the "speed loss" of defendant's vehicle before an accident. *State v. Pigueiras*, 344 *N.J.Super.* 297 (App. Div. 2001), *certif. denied*, 171 *N.J.* 337 (2002).

Expert can rely on hearsay as to prior crimes if of a type that experts in the relevant field rely on in reaching conclusions. *State v. Eatman*, 340 *N.J.Super.* 295 (App. Div.), *certif. denied*, 170 *N.J.* 85 (2001).

See State v. Tarlowe, 370 *N.J.Super.* 224 (App. Div. 2004).

XII. MISCELLANEOUS

A. Restraints

Trial judge must balance the need for courtroom security against potential prejudice if a defense witness will testify while handcuffed; if witness does, jury is to receive a cautionary instruction. *State v. Smith*, 346 *N.J.Super.* 233 (App. Div. 2002).